IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF MARYLAND and UNIVERSITY OF MARYLAND, COLLEGE PARK, Plaintiffs, v. ATLANTIC COAST CONFERENCE, Defendant.	Case No. CAL 13-02189

MEMORANDUM OF PLAINTIFFS BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF MARYLAND AND UNIVERSITY OF MARYLAND COLLEGE PARK IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY COMPLAINT

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Plaintiffs, the Board of Regents of the University System of Maryland and the University of Maryland, College Park, by their attorneys, hereby submit this Memorandum in Opposition to Defendant Atlantic Coast Conference's Motion to Dismiss or, Alternatively, to Stay Complaint.

INTRODUCTION

This lawsuit seeks relief for the Atlantic Coast Conference's illegal exercise of self-help remedies intended to penalize the University of Maryland, College Park, its students, coaches and fans, and deny it the significant benefits of moving to the Big Ten Conference in 2014. Through the illegal and improper conduct outlined in the Complaint, the ACC aims to send a message of deterrence to any other member school that might consider withdrawing from the conference – any such attempts to do so will be met with harsh penalties. The ACC's actions have resulted in the significant on-going and future damages suffered by the University.

The extensive factual allegations pleaded in the Complaint demonstrate that, if proven, the ACC's actions constitute an illegal restraint of trade in violation of the Maryland Antitrust Act, tortiously interfere with Maryland's contractual relationships and breach the ACC's contractual commitments to Maryland as a member of the conference. These claims entitle Maryland to recover compensatory and punitive damages and to obtain injunctive relief against the ACC's actions.

The ACC's motion to dismiss is fundamentally flawed. Again and again through its arguments, the ACC ignores the central precepts governing a Maryland court's treatment of a motion to dismiss: each and every allegation of the Complaint and all

reasonable inferences must be accepted as true and in a light most favorable to the plaintiff. Instead, the ACC argues facts it believes would support its version of events. That alone requires that the motion be denied.

The ACC's legal arguments fare no better. The ACC's motion is a direct, and legally groundless, attempt to circumvent the protections provided by the Maryland General Assembly against conduct that harm competitions and injures Maryland citizens by arguing that the Commerce Clause to the United States Constitution prevents the application of the Maryland Antitrust Law to it. Contrary to its overblown statements, the ACC's 12-member collegiate conference is not a unique commercial actor immune from the reach of Maryland antitrust law or other state regulation. The ACC, like other multi-state businesses choosing to conduct commerce in this State, is subject to the laws and regulations of Maryland and, when its actions injure Maryland citizens, those injured parties may turn to the Maryland Antitrust Act to redress their grievances. The ACC's constitutional argument is premised on a misapplication of cases applicable to truly national sports organizations and to rules of those organizations that are uniformly applied and essential to producing a nationwide product. Neither circumstance exists here. The ACC's arguments are also fundamentally flawed in their failure to apply the fact-specific inquiry required by the United States Supreme Court before a state regulation may be found to violate the Commerce Clause. (*See* ACC Br. at 6-11.)

Maryland's Complaint pleads a viable antitrust claim because the ACC's imposition of a $52 million withdrawal penalty is the direct effect of a horizontal conspiracy intended to and resulting in harm to competition. As pleaded, the withdrawal

penalty constitutes an illegal restraint of trade in violation of § 11-204 of the Commercial Law Article. Contrary to ACC's arguments, the United States Supreme Court has held that when the anticompetitive aspects of the challenged conduct are clear, the Court may apply a "quick look" approach and need not engage in extended rule of reason analysis. Further, antitrust injury is sufficiently pleaded where, as here, the Complaint makes clear that the Withdrawal Penalty imposed by the ACC on Maryland injures the plaintiffs as the direct and intended result of the attempt to restrict competition and also injures student-athletes and other university constituencies. (Compl. ¶¶ 50, 75, 78, 85-88, 90, 104, 106-07.)

Likewise, Maryland has pleaded cognizable state-based claims sounding in tortious interference with prospective advantage and breach of contract. Each of the elements of these claims is pleaded in the Complaint. (*Id*. ¶¶ 4, 50, 73-83, 114-15.)

The ACC's real purpose becomes abundantly clear, however, in its petition to have this Court stay this lawsuit in which Maryland seeks affirmative relief by way of damages and protection from the ACC's illegal activities in favor of a prematurely-filed declaratory judgment action that violates this State's sovereign immunity. That narrow action, filed to obtain a preferred forum and now stayed by the North Carolina Court of Appeals, in no way prevents this Court from providing the University and the Board of Regents a forum to fully and fairly adjudicate their claims. (*Id*. ¶¶ 13-14.) For all of the reasons, the ACC's motion should be dismissed in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND[1]

I. MARYLAND PUBLICLY ANNOUNCED ITS INTENT TO JOIN THE BIG TEN IN 2014, AND THE ACC RESPONDED IMMEDIATELY BY DEMANDING A $52 MILLION WITHDRAWAL PENALTY UNDER AN INVALID AND ILLEGAL AMENDMENT TO THE ACC CONSTITUTION.

The University of Maryland, College Park, is the flagship institution of the University System of Maryland, which is governed by the Board of Regents. (Compl. ¶¶ 7-8.) The ACC is a regional intercollegiate athletic conference that governs, regulates, and promotes intercollegiate athletic competitions among its members. (*Id.* ¶¶ 9, 18.) Maryland currently is a member of the ACC. (*Id.* ¶¶ 1, 9.)

On November 19, 2012, Maryland publicly announced its intent to join the Big Ten Conference in 2014. (*Id.* ¶ 1.) Maryland has not yet filed "official notice of withdrawal with each of the conference members and the commissioner" under Section IV-5 of the ACC Constitution. (*Id.* ¶¶ 51, Ex. 1 at § IV-5, 69-71, 83; *see also id.* ¶¶ 6, 50, 65, 89.) Undaunted by the Constitution's plain language and definition of "official notice," the ACC deemed Maryland's public announcement sufficient to begin extracting a $52 million penalty under a purported (but invalid) amendment to Section IV-5 (the "Withdrawal Penalty"). (*Id.* ¶¶ 3, 60, 65, 68-71, 83; *see also id.* ¶¶ 50, 89.)

In 2012, while recruiting new members, the ACC moved to prevent its existing members from leaving the Conference. (*Id.* ¶¶ 10, 53.) On September 11, 2012, in a vote of its Council of Presidents, the ACC purported to amend Section IV-5 of the ACC

[1] Maryland filed a 40-page Complaint, the allegations of which span 116 paragraphs. This section only summarizes those allegations and does not substitute for or limit the Complaint's extensive and exhaustive factual allegations.

Constitution and approve the Withdrawal Penalty. (*Id.* ¶¶ 3, 53.) Maryland voted against the Withdrawal Penalty and has not assented to it. (*Id.* ¶¶ 55, 58-59, 85.)

In their haste to adopt the Withdrawal Penalty, the ACC's members violated the ACC Constitution's requirements for amendment. (*Id.* ¶¶ 55, 92.) The ACC Constitution requires that any proposed amendment "be submitted, in writing, four weeks before the meeting, through the commissioner to the Constitution and Bylaws Committee for review." (*Id.* ¶¶ 51, Ex. 1 at § X-1, 56.) It further requires that the ACC commissioner "send complete copies of the proposed amendments to all members at least fifteen (15) days before the meeting" at which such amendments will be considered. (*Id.* ¶¶ 51, Ex. 1 at § X-1, 57.) Neither the ACC commissioner nor the ACC complied with these requirements. (*Id.* ¶¶ 58, 92.)

As a result, the purported amendment of Section IV-5 and the Withdrawal Penalty are unenforceable. (*Id.* ¶¶ 60, 92.) Nonetheless, the ACC enforced the Withdrawal Penalty through self-help by, among other things, withholding Maryland's distributions (millions of dollars) of conference revenues. (*Id.* ¶¶ 3-4, 50, 60, 65, 68.)

II. MARYLAND HAS NOT WITHDRAWN FROM THE ACC, YET THE ACC FILED A COMPLAINT FOR A DECLARATORY JUDGMENT IN NORTH CAROLINA SEEKING TO ENFORCE THE WITHDRAWAL PENALTY.

The ACC Constitution specifically defines what must occur for an official notice of withdrawal: "To withdraw from the conference a member must file an official notice of withdrawal with each of the conference members and the commissioner on or before August 15 for the withdrawal to be effective June 30 of the following year." (*Id.* ¶¶ 51, Ex. 1 § IV-5, 69-70.) Maryland has not yet filed an official notice and need not do so

before August 15, 2013, in order to join the Big Ten Conference in 2014. (*Id.* ¶¶ 70-71.) Maryland has not yet withdrawn from the ACC; Maryland is not presently subject to the Withdrawal Penalty (regardless of its enforceability) and remains an ACC member with full rights and privileges. (*Id.* ¶¶ 65, 70-71, 83.)

After Maryland's announcement, and with no prior notice to Maryland, the ACC rushed into a North Carolina court on November 26, 2012, and filed a narrow declaratory judgment action seeking a declaration that the withdrawal penalty is enforceable as a contractual matter:

> The ACC is entitled to a declaratory judgment by the Court determining and declaring that the Section IV-5 of the ACC's Constitution, requiring payment by any withdrawing member of the withdrawal payment, is a valid and enforceable contractual term and that defendant Maryland is subject to the withdrawal payment of $52,266,342.

(Ex. A, North Carolina Compl. ¶ 42.)[2] The ACC hopes that its North Carolina action will do something more—freeze Maryland out of its own courts.

Maryland moved to dismiss the North Carolina action for lack of personal jurisdiction, asking the North Carolina court to recognize Maryland's sovereign immunity and treat Maryland as sovereign in North Carolina. (Compl. ¶ 14.) The North Carolina trial court denied Maryland's motion. (Ex. B, North Carolina Trial Court Order,

[2] A true and correct copy of the complaint filed by the ACC in North Carolina state court is attached hereto as Exhibit A. As the ACC noted in its brief, this Court can take judicial notice of this public pleading. (ACC Br. at 5 n. 2; s*ee also Evans v. Cnty. Council of Prince George's*, 185 Md. App. 251, 255 n.2, 969 A.2d 1024, 1027 n.2 (2009)).

dated February 25, 2013.) Maryland immediately filed a Notice of Appeal of that decision. On April 18, 2013, the North Carolina Court of Appeals stayed all further proceedings in the trial court until that appeal concludes. (Ex. C, Order of North Carolina Court of Appeals, dated April 18, 2013.)

While the ACC vigorously opposes the recognition of Maryland's sovereign immunity in North Carolina courts, it asks this court to stay this action. Amazingly, the ACC argues that this Court should defer entirely to a North Carolina trial court – which just refused to recognize Maryland's sovereign immunity – on the basis of "comity." (ACC Br. at 33-35.) Doing so would delay Maryland's ability to obtain relief and allow the ACC to choke off access to funds needed for Maryland's athletic programs, inflicting on-going damage to the University, its students, and fans. (Compl. ¶¶ 73-78.)

III. MARYLAND FILED THIS ACTION TO REMEDY THE ACC'S UNAUTHORIZED AND ILLEGAL SELF-HELP AND ACTIONS TO PUNISH MARYLAND FOR LEAVING THE ACC.

Not content simply to seek a declaration in court, the ACC decided to exercise self-help and withhold Maryland's distributions of conference revenues, even though Maryland has not yet given official notice of withdrawal and is not yet subject to the Withdrawal Penalty (even if it was enforceable). (*Id.* ¶¶ 60, 65, 68-71, 83.) The ACC withheld Maryland's share ($3,067,255) of the conference revenues distributed in December 2012, and, in a letter dated December 14, 2012, the ACC made plain its intent to withhold all future distributions from Maryland. (*Id.* ¶ 73.) The ACC is aware that its withholding of additional monies includes NCAA distributions intended to help fund Maryland's student-athlete grants-in-aid and sports scholarships. (*Id.* ¶¶ 74-78.) Further,

since November 2012, the ACC has systematically excluded the Maryland President and University representatives from ACC meetings, even though Maryland remains a full member of the Conference. (*Id.* ¶¶ 5, 79-80, 82-83.) The ACC's illegal and unauthorized actions damage Maryland, threaten the competitiveness of its athletic programs, and give rise to claims against the ACC.

Maryland filed this action on January 18, 2013, to protect its interests and those of the Maryland taxpayers, asserting, *inter alia*, claims for breach of contract, tortious interference, and violations of the Maryland Antitrust Act. Among other things, Maryland seeks an award of compensatory and punitive damages incurred as a direct and proximate result of the ACC's misconduct. No similar damage claims are asserted in North Carolina.

IV. THE ADOPTION AND APPLICATION OF THE WITHDRAWAL PENALTY LACKS ANY ECONOMIC JUSTIFICATION, HARMS MARYLAND, AND IS ANTICOMPETITIVE.

As alleged in the Complaint, the ACC members jointly agreed to impose a penalty on Maryland that reduces the output of Maryland athletics (and thus both the opportunities for athletes to compete and for fans to attend athletic events) by imposing a penalty that is greater than the entire annual budget for Maryland athletics. (*Id.* ¶¶ 3, 64, 75, 77, 86-87, 90, 107.) The adoption and imposition of the Withdrawal Penalty, in an attempt to cripple the competitiveness of Maryland's athletic teams, represent the joint action of the ACC members that voted for the amendment and authorized the action. (*Id.* ¶¶ 85, 106.) This joint action by the ACC members is a horizontal agreement among competitors that unreasonably restrains trade. (*Id*.)

The ACC, acting as a joint venture and instrumentality of universities that compete with Maryland, attempts to deny Maryland significant athletic, academic, and financial benefits by preventing Maryland from leaving the Conference or, alternatively, to impede and to penalize Maryland for its decision to join the Big Ten Conference in order to deter other institutions from withdrawing from the ACC. (*Id.* ¶¶ 50, 75, 85, 90.) The ACC attempts to do this by imposing the Withdrawal Penalty, despite the fact that it is void and unenforceable under the ACC Constitution; by withholding Maryland's share of conference revenues (and announcing its intention to withhold all future revenues until the Withdrawal Penalty is paid in full), even though Maryland had not yet formally withdrawn from the ACC; and by denying Maryland (and its athletic teams) equal treatment and access with respect to ACC meetings, proceedings, and decision-making. (*Id.*) The $52,266,342.00 penalty would constitute the largest payment ever made by any institution to leave any athletic conference and is multiple times larger than any other intercollegiate athletic conference exit fee. (*Id.* ¶ 54.)

By withholding revenue rightfully owing to Maryland and imposing the Withdrawal Penalty, the ACC adopted a course of action to render Maryland's athletic teams less competitive within the Conference during the two years it will remain a conference member.[3] (*Id.* ¶¶ 75, 85, 90.) Members of a conference should have an interest in having each member of the conference be a strong competitor that will enable

[3] The Withdrawal Penalty will also cripple Maryland after it leaves the Conference. (Compl. ¶¶ 50, 76-78, 85, 87.)

the conference events to have greater entertainment appeal and attraction due to the uncertain outcome of an athletic event. (*Id*. ¶ 90.) Instead, the conduct undertaken by the ACC is consistent with an effort to suppress and limit competition among conferences and teams, as universities (such as Maryland) evaluate whether other conferences may best serve their students, faculty, alumni, and research activities. (*Id*.)

Neither the adoption of the Withdrawal Penalty nor the ACC's method of extracting the Withdrawal Penalty falls within any semblance of a policy or conduct required for the success of any legitimate ACC joint venture and is not reasonably ancillary to any legitimate joint conduct by the ACC and its association members. (*Id.* ¶¶ 3, 61-62, 85, 90.) Juxtaposing the ACC's $2 million entry fee with its $52 million Withdrawal Penalty demonstrates that the ACC fears competition and wants to prevent other conferences from competing for and offering procompetitive opportunities to the ACC's current members. That gross disparity also shows that the ACC wants to deter current ACC members from considering moving to another conference that might – with the addition – present an even stronger conference offering in comparison to the ACC and that might appeal to more fans, sponsors, and broadcasters than are currently attracted to NCAA athletic events. (*Id*. ¶¶ 85, 90, 104, 107.)

MOTION TO DISMISS STANDARD

A complaint only needs to "contain a clear statement of the facts necessary to constitute a cause of action." Md. Rule 2-305. "The paramount purpose of this requirement is to give defendants notice of the claims against them." *Tierco Md., Inc. v. Williams*, 381 Md. 378, 403 n. 20, 849 A.2d 504, 519 n. 20 (2004). Here, there can be no

question that Maryland's 40-page, 116-paragraph Complaint provides the ACC with ample notice of the nature and basis of the claims Maryland has asserted here.

"Upon review of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a court must 'assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them' and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action." *Lloyd v. General Motors Corp.*, 397 Md. 108, 121, 916 A.2d 257, 264 (2007) (internal quotation and citation omitted).[4] The Court must view all well-pleaded facts and the inferences from those facts in a light most favorable to the plaintiff." *Id.* at 122, 916 A.2d at 265.

[4] While the ACC pays lip service to these black letter principles, its brief largely ignores them. For example, the ACC's brief reads as if the amendment to Section IV-5 is valid and enforceable, ignoring Maryland's contrary allegations entirely. The ACC also pretends that Maryland has already provided "official notice of withdrawal" under the ACC Constitution, even though Maryland has unambiguously alleged facts demonstrating that it has not. Indeed, the entire gravamen of the ACC's brief is not that Maryland has neglected to plead sufficient facts to state a claim, but that the ACC's worldview with respect to the pleaded facts should prevail. None of this is appropriate for a motion to dismiss. If the ACC wants to challenge the factual merits of Maryland's claims, it must await discovery, summary judgment motions, and trial.

ARGUMENT

I. THE STATE OF MARYLAND'S STRONG LOCAL INTEREST IN ENFORCING ITS ANTITRUST LAWS AND REMEDYING A SIGNIFICANT INJURY SUFFERED IN MARYLAND GREATLY OUTWEIGHS ANY CLAIMED (AND ENTIRELY ILLUSORY) BURDEN ON INTERSTATE COMMERCE.

Count III of the Complaint alleges that the ACC's imposition of an exit fee in excess of $52 million on Maryland illegally restrains trade and violates the Maryland Antitrust Act, Md. Code. Ann., Com. Law. § 11-204 (the "Antitrust Act"). (Compl. ¶¶ 102-112.) The ACC contends that the Commerce Clause, Article 1, section 8 to the United States Constitution, renders the State of Maryland powerless to regulate the ACC's conduct and immunizes its anticompetitive actions from scrutiny under the Antitrust Act. (ACC Br. at 6-11.) This is so, the ACC says, because it (1) conducts its business across several states and (2) is in the business of collegiate sports. (*Id.* at 7, 10-11.) According to the ACC, sports leagues "like the ACC" are "unique commercial actors" whose "very nature requires that they be regulated at the national level if it is to exist at all." (*Id.* at 7, 11.) The ACC proclaims that there is "no difference" between itself and other professional and amateur sports leagues, like Major League Baseball, the National Football League and the NCAA, which the Commerce Clause "routinely" shields from state antitrust laws. (*Id.* at 6-11.) The ACC contends that these "well-established" principles preclude the Court from applying the Antitrust Act because doing so would burden the ACC's activities in other states, inhibiting interstate commerce. (*Id.* at 11.)

The ACC is wrong at every turn. There is no constitutional impediment to application of the Antitrust Act to interstate businesses as a general matter or to the ACC's seven-state collegiate sports conference. The Antitrust Act serves important state interests by protecting this State's citizens from unfair and anticompetitive business practices. As Maryland has alleged, the Withdrawal Penalty and the ACC's efforts to enforce it are unfair, anticompetitive, and prohibited by the Antitrust Act. Application of the Antitrust Act to the ACC's anticompetitive conduct is necessary to redress significant harm inflicted in this State on Maryland residents, including the students, teachers, coaches, athletes, and fans of the University of Maryland and the taxpayers of this State. The ACC has not shown (and could not show) that enforcing the Antitrust Act here would undermine a pressing need for national uniformity or impede the flow of interstate commerce. Indeed, the ACC is no different than any other commercial actor that must conform its conduct to varying laws and regulations of multiple states.

Even if the ACC had shown some burden on interstate commerce (and it has not), this Court could not conclude that such burden was excessive without first hearing the evidence and concluding as a factual matter that the Antitrust Act's putative benefits are substantially outweighed by excessive burdens on interstate commerce. For all of these reasons, the ACC's motion should be denied.

A. The State May Apply the Antitrust Act to Seek Redress For Harm Inflicted in Maryland on Maryland Residents.

It is a basic proposition that states, including Maryland, may regulate activities in their state even when those regulations impact out-of-state business. *See Osborn v. Ozlin*,

310 U.S. 53, 62 (1940) (constitutional provisions do not invalidate the application of state law merely because it may have repercussions beyond state lines).[5] Thus, in *Maryland v. Philip Morris, Inc.*, the court rejected the tobacco companies' argument that claims brought by the Maryland Attorney General under the Antitrust Act were "necessarily federal in nature, because the complaint allege[d] a nationwide conspiracy involving conduct outside Maryland's borders engaged in by non-Maryland defendants" and remanded the case to state court. 934 F. Supp. 173, 176 (D. Md. 1996). Even under such circumstances, the district court held federal law did not preempt the Antitrust Act because the Attorney General was "seeking redress for harm inflicted in Maryland on Maryland residents." *Id*. The presumption, therefore, is that the State may regulate the ACC unless the ACC can demonstrate good reason to deviate from this basic principle.

B. The Commerce Clause Analysis Requires a Balancing of Interests and a Full Factual Inquiry.

The ACC tries, unsuccessfully, to use the Commerce Clause as that reason. The Constitution grants Congress the power to "regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. State statutes can run afoul of the Commerce Clause, even where there is no direct federal legislation, by imposing an unreasonable burden on interstate commerce. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128

[5] *See also Valley Bank v. Plus Sys., Inc*., 914 F.2d 1186, 1190-91 (9th Cir. 1990) (states can enact legislation affecting interstate commercial relationships); *RLH Indus., Inc. v. SBC Commc'ns, Inc*., 35 Cal. Rptr. 3d 469, 477-81 (Ct. App. 2005) (applying state antitrust law to conduct outside the state to remedy in-state harm where federal antitrust law also prohibited such conduct so risk of inconsistency low).

(1978). The United States Supreme Court employs a two-part test for determining whether a state law imposes an unreasonable burden, balancing the State's legitimate local interests against any burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Applied here, *Pike* requires the Court to determine: (1) whether Maryland's interest in preventing the ACC's unfair trade practices within its borders and seeking relief for the resultant harm inflicted within Maryland is a legitimate local purpose; and (2) whether the burden imposed on the ACC's interstate activities by the Antitrust Act, namely state regulation and invalidation of the Withdrawal Penalty as applied to Maryland under these facts, is "clearly excessive" in relation to the putative local benefits. *Id.*

The ACC's brief does not once mention *Pike*. That is unsurprising. The *Pike* balancing test cannot, except in circumstances where the courts have already conducted an extensive inquiry, be applied as a matter of law; it requires a developed factual record and fact-finding. *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 263-64 (2d Cir. 2001) (finding that the *Pike* balancing test is a fact-intensive inquiry and declining to rule that county's interests in local ordinance were not substantially outweighed by the burden on interstate commerce before adequate discovery). The ACC's argument is (in addition to being fundamentally flawed) uniquely inappropriate for a motion to dismiss. Courts typically decline to conduct the *Pike* balancing test until after discovery. *See, e.g., Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008) (noting, although ultimately not applying the *Pike* balancing test, that although a state law does not discriminate explicitly against interstate commerce, "we

generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*" for purposes of balancing the burdens and benefits); *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 612-13 (2d Cir. 1996) (holding summary judgment on Commerce Clause claim concerning preemption inappropriate; "[s]ince there are genuine factual issues as to both the claimed burdens and the putative benefits created by the New York bumper statute" and remanding for "development of the record in order to permit the district court to apply the *Pike* . . . balancing test"); *Associated Film Distrib. Corp. v. Thornburgh*, 520 F. Supp. 971, 974 n.10 (E.D. Pa. 1981) (declining to grant summary judgment on dormant Commerce Clause challenge and noting that "additional facts are necessary for [a] determination under the [*Pike*] 'balancing' test").

Given *Pik*e, this Court should deny the ACC's motion to dismiss and apply the *Pike* balancing test, if at all, only after discovery and development of a full factual record. But even a cursory examination of the *Pike* factors in light of Maryland's extensive factual allegations makes clear that the ACC's motion must be denied.

1. As Alleged in the Complaint, Maryland Has a Strong and Legitimate Interest in Applying the Antitrust Act to the ACC's Anticompetitive Withdrawal Penalty and Behavior.

Little doubt exists that the State has a legitimate interest in protecting its citizens from unfair trade practices and anticompetitive conduct. As the United States Supreme Court has held, antitrust laws are the "Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States*

v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). Regulations advancing a legitimate public interest – here regulation under the Antitrust Act – are within the State's inherent police powers. *Salisbury Beauty Sch. v. State Bd. of Cosmetologists*, 268 Md. 32, 48, 300 A.2d 367, 377-78 (1978) (holding that the Maryland General Assembly exercises broad discretion in determining what the public welfare requires, what may be injurious to the general welfare, and what measures are appropriate to protect these interests); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140 (1973) (noting that it is well-settled that the federal power to regulate commerce is not exclusive, and states have inherent police power to regulate commerce within their borders, even though such activities may include or affect interstate commerce).

The Maryland General Assembly has clearly articulated its intent that the Antitrust Act reach interstate conduct that causes injury within the State of Maryland:

> It is also the intent of the General Assembly that, in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition within the State, determination of the relevant market or effective area of competition may not be limited by the boundaries of the State.

Md. Code Ann., Com. Law § 11-202(a)(3). The Antitrust Act clearly reaches interstate activities, and its text evinces a strong State interest in preventing injuries to Maryland citizens and in seeking redress for harm inflicted in Maryland on Maryland citizens.

Here, Maryland seeks to protect and advance these strong local interests by invoking the Antitrust Act to challenge the ACC's conduct. (Compl. ¶¶ 6, 102-112.) That interest is heightened in this case where some of the objects of the ACC's

misconduct are the State's flagship university, its student-athletes, coaches and fans. (*Id.* ¶¶ 7, 8; *see also id.* ¶¶ 50, 75.) As the Complaint clearly alleges, the ACC and its member institutions conspired and acted jointly to adopt and (prematurely) enforce the Withdrawal Penalty with the purpose and intended effect of crippling the competitiveness of Maryland's athletic teams and deterring competition among conferences. (*Id.* ¶¶ 50, 75, 85, 90.) Indeed, the ACC has used self-help measures to extract the Withdrawal Penalty by withholding millions in distributions owed to Maryland. (*Id.* ¶¶ 4, 65, 68, 73, 81, 98.) Those actions have harmed and will continue to cause harm within the State, and Maryland's interest in redressing the harm to the State and its citizens is paramount. (*Id.* ¶ 107; *see also id.* ¶¶ 50, 75.)

2. The Antitrust Act Does Not Impose an Excessive Burden on Interstate Commerce.

The ACC argues that Maryland's interests are outweighed because the ACC, as a regional collegiate athletic conference, engages in activities of interstate commerce and requires nationally uniform governance. (ACC Br. at 6-11.) Putting aside the fact-intensive nature of that assertion, making it improper for a motion to dismiss, the argument is just plain wrong.

The Supreme Court rejected that same basic argument, advanced by oil companies claiming that the nationwide character of their industry prohibited state regulation of the retail market for gasoline in *Exxon Corp.*, 437 U.S. at 128-29. Acknowledging that the cumulative effect of differing state legislation would impact operations, the Supreme Court nonetheless dismissed the argument reasoning that it has "only rarely held that the

Commerce Clause itself preempts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods." *Id*. Historically, the Supreme Court has found that need for national uniformity primarily in transportation cases. In *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945), the Court found unconstitutional state laws that required railroad companies to change a train's car length when it crossed a state border (or else to run shorter trains) and reached the same conclusion about state trucking regulation in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978).

The ACC bears no resemblance to an interstate railroad or freight company. Its business – organizing and promoting athletic competitions among 12 schools in seven states – does not present a unique need for "national uniformity" without which interstate commerce will suffer undue burden. The ACC is no different than any other commercial actor that must conform its operations to the laws and regulations of multiple states. If the ACC were insulated from state antitrust laws (not only in Maryland, but everywhere) based only on its self-anointed "national character" ("regional character" would be far more accurate), every multi-state business would also claim exemption. That is not the law.

The fallacy of the ACC's argument becomes apparent when considered in the context of Maryland's allegations. Maryland alleges that the Antitrust Act prohibits the Withdrawal Penalty and the ACC's efforts to enforce it. (Compl. ¶¶ 6, 102-12.) Maryland is not attempting to require or mandate something that other states prohibit. The ACC offers no pressing need for "uniformity" here; no irreconcilable conflict will

emerge if the Antitrust Act precludes the Withdrawal Penalty in Maryland. The ACC would be faced with a choice familiar to multi-state commercial actors—choose to apply the penalty in states that permit it but not in states that do not, abandon the penalty altogether, or stop doing business in states that prohibit the penalty (what will actually happen here after Maryland withdraws). The mere fact that the ACC wants the penalty to apply everywhere is not a Commerce Clause violation: "the commerce clause does not exist to protect a business's right to do business according to whatever rules it wants." *Valley Bank v. Plus Sys., Inc.*, 914 F.2d at 1192.

Under the ACC's logic, any conduct or practice that it reduced to a "rule" would not be subject to review or regulation by *any* state, not just Maryland. That is an extraordinary and untenable position. The Commerce Clause does not protect the ACC from the mere possibility of inconsistent state regulation regarding the validity and enforceability of the Withdrawal Penalty, when such inconsistencies can coexist without conflict, so long as each state regulates only the injuries inflicted in its own state. *Id*.

C. The Professional Sports and NCAA Cases Provide the ACC No Refuge.

Unable to show any real need (as opposed to desire) for "uniformity" or to justify the logical consequences of its position, the ACC tries to shove itself into a narrow line of cases holding that professional sports leagues and the NCAA are not, in certain circumstances, subject to state antitrust laws. At the outset, the so-called "sports" exception that ACC invokes is narrow, at best. Courts have not hesitated to apply state law, including state antitrust law, to athletics despite the possibility of inconsistent

regulation. *See Jim Evans Acad. of Prof'l Umpiring, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc.*, No. 48-2012-CA-13001, at 6, 9 (Fla. Cir. Ct. Orange Cnty. Mar. 28, 2013) (holding that state antitrust laws are applicable to various aspects of the "business of baseball," including professional baseball's dealings with the umpire academy); *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1025 n.8 (Fla. 1994) (holding that baseball's antitrust exemption was limited to the "reserve system" by which major league baseball bound players to teams and did not apply to the entire "business of baseball," thereby allowing antitrust investigation under state law to proceed); *Williams v. NFL*, 582 F.3d 863, 877-78 (8th Cir. 2009) (rejecting NFL's national uniformity argument and holding that football players' challenge under Minnesota law to a collectively bargained NFL drug policy was not preempted by federal labor law).

More importantly, the ACC bears no resemblance to national professional sports leagues or to the NCAA. The professional sports cases deal with the inapplicability of state antitrust law to the labor policies of *professional* sports leagues that operate at a *nationwide* level. *See Flood v. Kuhn*, 407 U.S. 258 (1972) (affirming that state antitrust law is not applicable to *professional* baseball's reserve clause regulating player movement among clubs); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y 1975) (holding state antitrust laws inapplicable to *national* basketball league); *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378 (1983) (holding state antitrust laws inapplicable to *national* football league). In each of these cases, the challenged league rule or practice was implemented on a nationwide basis and was considered essential to the effective

running of a national league. *See Flood*, 407 U.S. 258 (challenging baseball's reserve clause preventing player movement between teams); *Robertson*, 389 F. Supp. 867 (challenging the college draft, the use of a reserve clause in mandatory contracts, compensation plans, and blacklisting techniques as unreasonable restraints on trade); *Partee*, 34 Cal. 3d 378 (challenging the draft, option clauses in players contracts, tampering rules, and collective bargaining agreement terms as unreasonable restraints on trade). Each court concluded that, as a factual matter, the lack of uniform regulation of the leagues' labor policies threatened the continued existence and nationwide character of the leagues and their ability to produce an athletic product at all.

The ACC's argument that courts routinely conclude that application of state statutes to the activities of *amateur* sports leagues impermissibly burdens interstate commerce is simply incorrect. No case has ever held that state antitrust laws are inapplicable to amateur sports leagues, let alone that such laws are unconstitutional.[6] The ACC can only point to *National Collegiate Athletic Association v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992), but that case did not concern state antitrust laws and has no bearing here. Rather, *Miller* dealt with a Commerce Clause challenge to a Nevada statute imposing certain minimum procedural standards on the NCAA when it investigated a

[6] The ACC's citation to the Practitioner's Guide to the Maryland Antitrust Act is a misleading and cherry-picked quote, cobbled together from various portions of the Guide's text. The ACC chose not to share with the Court the language after the quoted passage, which reads, "Nevertheless, the commerce clause should not prevent vigorous state antitrust enforcement in areas where state interests are strong and the need for a uniform national rule is weak." William L. Reynolds II & James D. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 Md. L. Rev. 323, 341 (1976).

member institution for rules infractions. *Id*. at 1483. The court concluded that the Nevada statute would effectively invalidate the NCAA's entire internal governance system and impose procedural requirements with which the NCAA could not comply. Given these drastic consequences, the court held that the significant harm to the NCAA's uniform enforcement of regulations across the country outweighed Nevada's limited local interests. *Id*. at 1485. *Miller* does not articulate some broad rule that state antitrust laws (or any state laws) may not be applied to any collegiate athletic association, as the ACC suggests. The language and logic of *Miller* are plainly limited to the NCAA given its unique, overarching, nationwide role in the regulation of collegiate athletics.

Further, the ACC bears no resemblance to a national professional sports league or to the NCAA. The ACC is a *regional* conference that organizes among amateur collegiate athletic programs. (Compl. ¶¶ 9, 19.) Each of the ACC institutions (and the ACC) is itself governed by the rules of the national organization, the NCAA. (*Id.* ¶¶ 17-18.) The ACC is one of many *regional* collegiate athletic conferences. (*Id.* ¶¶ 18-19.) Significantly, unlike member teams of the NFL, for example, members of the ACC do not depend on the ACC's existence to preserve any uniform character of the products they are marketing, or, indeed, to market the product of intercollegiate athletics at all. In fact, all members of the ACC engage in "non-conference" athletic competitions, and at least one in-coming member of the ACC, Notre Dame, will be a conference member for some purposes but not for others. (*Id.* ¶ 10.) The national pattern involves frequent realignment within athletic conferences, (*id.* ¶¶ 24-25), demonstrating that conferences are not necessary to create the product of collegiate athletics.

For these reasons, the ACC is not comparable to the NCAA. The NCAA is a national association of colleges, universities, conferences, and organizations, consisting of thousands of members, formed with the basic purpose to "maintain intercollegiate athletics as an integral part of the educational program" and to "retain a clear line of demarcation between intercollegiate athletics and professional sports." *Miller*, 795 F. Supp. at 1479. The NCAA sets the rules for all student-athletes and colleges participating in intercollegiate athletics nationwide and has a national enforcement program to accomplish compliance with these rules. (Compl. ¶ 17.) The ACC is only a regional association currently consisting of only twelve member institutions from seven states, including the State of Maryland. (*Id.* ¶¶ 9, 18.) The ACC's primary role is organizing and promoting athletic competitions; it does not establish or enforce the rules of the game. (*See id.* ¶¶ 9, 17-18.) Unlike in *Miller*, Maryland does not challenge the NCAA's enabling rules, its overall eligibility rules, its amateur rules, its on-field playing rules, or any ACC rule that could plausibly be characterized as essential to the effective operation of a collegiate athletic conference. Rather, the Complaint challenges an agreement among the ACC and most of its member institutions to punish Maryland in order to lessen Maryland's ability to compete and deter others from leaving the Conference. (*Id.* ¶¶ 3, 50, 75.) The ACC stands at the hub of this agreement and none of the cases it cites even suggests that this conduct is immune from state scrutiny simply because it involves sports.

Maryland's challenge to the Withdrawal Penalty does not involve a fundamental rule requiring national uniformity in order to create an athletic product. Indeed, there is

no nationwide uniformity with respect to whether a conference imposes a withdrawal penalty or the amount of the penalty. The $52 million penalty the ACC seeks to enforce would be the largest ever levied. (*Id.* ¶ 54.) In contrast, the Big Ten, the Pac-12 and the SEC assess no exit fee at all. (*Id*.) The ACC never explains why the Withdrawal Penalty is essential to the effective running of its "business" while other, larger conferences function well without such a punitive penalty. The ACC's argument amounts to nothing more than a jealous defense of a desired (because it would effect a windfall) business practice, rather than a serious claim that the Antitrust Act unduly and unreasonably burdens interstate commerce. The Commerce Clause does not prevent Maryland from enforcing laws that the ACC does not like. *See Exxon Corp.*, 437 U.S. at 127.

At bottom, the ACC attempts to take cases that discuss the unique characteristics of nationwide sports league structures and the essentials of running such a business and apply them to a regional entity that organizes competitions but does not make the rules of the game. No court has ever held that national (or regional) uniformity is required with respect to the regulation of withdrawal penalties imposed on universities changing athletic conferences or that the state interest in regulation of such penalties is outweighed by the desire for "uniformity." This Court should not be the first, nor should it consider such a holding without first engaging in extensive fact-finding. The ACC has not shown it is a unique commercial actor commensurate with a professional sports league or that the regulation of withdrawal penalties such as the one it seeks to impose upon the University of Maryland is essential to its ability to operate in interstate commerce. The ACC's constitutional argument fails and its motion should be denied.

II. THE COMPLAINT'S DETAILED ALLEGATIONS STATE A CLAIM FOR VIOLATION OF THE ANTITRUST ACT.

Maryland's antitrust claim challenges the horizontal conspiracy engineered by the ACC to prevent competition from other conferences, to inflict harm on Maryland, and to impede Maryland's ability to compete against the ACC and its member schools for student-athletes, coaches, sponsors, and fans. (Compl. ¶¶ 50, 75, 85-88, 90, 102-12.) Maryland and the ACC's remaining members are horizontal competitors within the meaning of the antitrust laws. Yet those other ACC schools – at the ACC's urging – agreed with each other to inflict an unjustified and unprecedented Withdrawal Penalty on Maryland (and any other member that might try to leave the Conference and compete against the other ACC schools in a different conference). (*Id.* ¶¶ 53-55.) Not only does the sheer magnitude of the Withdrawal Penalty unreasonably restrain competition among conferences for members, it also threatens to harm student-athletes and coaches and to reduce the output of Maryland athletics and Maryland athletic events because Maryland may need to further reduce its programs. (*Id.* ¶¶ 48, 50, 74-78, 85-88, 104-07.) Maryland alleges facts that, if proven, make the ACC liable under the Antitrust Act.

Courts exercise caution when evaluating antitrust claims at summary stages of litigation because "motive and intent play leading roles" and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962). Dismissal at this stage, without allowing Maryland a full and fair

opportunity to conduct discovery, would be premature.[7] For these reasons, the ACC's motion should be denied and Maryland be allowed to conduct the discovery necessary to provide further proof of its claims. The Complaint's allegations (which must be accepted as true and supported by all permissible inferences) state a valid cause of action under the Antitrust Act.

A. As Alleged, The Withdrawal Penalty is Subject to the "Quick Look" Analysis Such That No Specific Relevant Market Allegations Are Required.

The ACC's Withdrawal Penalty acts as an obvious and direct restraint on competition by deterring schools from leaving the ACC or severely penalizing them if they do. (Compl. ¶¶ 50, 85-87, 90, 108.) In arguing that the Complaint must allege a relevant product and geographic market and that this Court cannot rely on direct evidence of competitive harm, the ACC ignores the Supreme Court's dictate that, in many cases, a

[7] *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 198, 214 (2d Cir. 2001) (whether conduct alleged in complaint had anticompetitive impact was a question of fact that could not be resolved without discovery); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. Pa. 1995) (finding that "the adequacy of a physician's contentions regarding the effect on competition is typically resolved after discovery"); *TransWeb, LLC v. 3M Innovative Props. Co.*, No. 10-4413 (FSH), 2011 U.S. Dist. LEXIS 59095, *56 (D.N.J. June 1, 2011) (stating that "[b]ecause causes of an injury are inherently factual in nature, . . . the existence of antitrust injury is not typically resolved through motions to dismiss") (internal quotation and citation omitted); *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 157 F. Supp. 2d 609, 618 (D. Md. 2001) (holding that plaintiff had sufficiently pleaded an antitrust injury as a result of anticompetitive behavior for purposes of surviving a motion to dismiss because most cases resolve this issue at summary judgment or directed verdict stage, and not on motion to dismiss); *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 388 (D. Md. 1990) (plaintiff's allegations of a lack of effective competition due to defendants' conduct must be taken as true and only through discovery could the issue be resolved).

full rule of reason analysis is unnecessary to conclude that a restraint unreasonably restrains trade. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984). The Supreme Court has made clear that a per se (*i.e.*, automatic illegality) or "quick look" approach, and not the extended rule of reason analysis, is the appropriate standard when the anticompetitive aspects of the challenged conduct are clear, as they are here.[8]

Given the Complaint's allegations that the Withdrawal Penalty reflects a horizontal conspiracy that restrains competition from other conferences and among the ACC members, (Compl. ¶¶ 50, 85, 90, 106), Maryland need not allege a specific relevant market in order to state a claim for an illegal restraint of trade under the Antitrust Act (or federal law).[9] In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Supreme Court affirmed the FTC's finding that a restriction by dentists on providing X-rays to insurers violated Section 1 of the Sherman Act. The Supreme Court rejected the precise argument that the ACC makes here—that an antitrust claim must allege a relevant market—and instead made clear that the "failure to engage in detailed market analysis is

[8] The Complaint also alleges that the horizontal conspiracy among the ACC and certain of its members is per se illegal under the Antitrust Act, (Compl. ¶¶ 86-87, 108), but the Court need not consider that issue now, because Maryland has adequately stated a claim under the quick look (or another less than full rule of reason) analysis.

[9] The Antitrust Act was enacted to complement the body of federal law governing restraints of trade. *See* Md. Code Ann., Com. Law § 11-202(a)(1). In interpreting it, courts are guided by interpretations given by federal courts to federal statutes that address similar issues. *See Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 53, 485 A.2d 663, 666 (1984).

not fatal to [the FTC's] finding of a violation of the Rule of Reason." *Id.* at 460. The Supreme Court explained:

> since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects such as a reduction of output can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.

Id. The Supreme Court subsequently explained in *California Dental Association v. FTC* that the "quick look" version of the rule of reason is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U.S. 756, 770 (1999). The Supreme Court instructed that courts should adopt a level of inquiry appropriate for a particular case "looking to the circumstances, details, and logic of a restraint." *Id.* at 780-81.

In many respects, this lawsuit resembles the antitrust violation found in *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998), when the NCAA and its member universities adopted a rule to limit the compensation paid to certain entry level assistant coaches, rather than compete against one another by offering higher salaries. The Tenth Circuit, in affirming summary judgment for plaintiff, held that the horizontal agreement among the NCAA members (effectuated by an NCAA rule) violated the antitrust laws without the need for a lengthy economic analysis. *Id.* at 1020-21. Here, the Complaint clearly alleges that ACC schools are horizontal competitors that set the Withdrawal Penalty so high that Maryland and other ACC schools that might want to leave the ACC

to compete as members of another conference either will not leave or – if they leave – will suffer such a financial penalty so as to undercut their ability to compete against the remaining ACC schools. (Compl. ¶¶ 50, 85-87, 90, 106.) The ACC as a member (indeed ringleader) of the conspiracy is equally liable for all damages caused by the joint action of the horizontal competitors within the conspiracy. *See United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (antitrust conspiracy among group of competing dealers and automotive manufacturer). Further, given the ACC's central role in implementing the penalty at the heart of this conspiracy, injunctive relief against the ACC is the best means to prevent further enforcement of the Withdrawal Penalty.

When, as here, no plausible procompetitive justification exists for creating a $52 million penalty on any university that dares to leave the ACC and compete through another conference, no detailed market examination is required. *See Law*, 134 F.3d at 1020 (applying the quick look analysis to NCAA rule because the "practice has obvious anticompetitive effects"); *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674-76 (7th Cir. 1992) (upholding the application of the quick look approach to sports joint venture's television broadcasting restriction); *see also N. Tex. Spec. Phys. v. FTC*, 528 F.3d 346, 362-63 (5th Cir. 2008) (upholding use of quick look approach for activities of a physicians' association); *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, 172 F. Supp. 2d 680, 692 (D. Md. 2000) (upholding "quick look" approach because "the anti-competitive effects of Defendants' conduct on the relevant market can be easily determined"). Maryland need not plead specific market allegations to state a claim.

Neither *Tanaka v. University of Southern California* nor *JES Properties, Inc. v. USA Equestrian, Inc.* – two cases on which the ACC principally relies and that discuss relevant markets – undermines Maryland's claim because the quick look analysis eliminates not only the need to prove a specific relevant market at trial, but also *a fortiori* the need to plead specific relevant product and relevant geographic markets to defeat a motion to dismiss. As the Supreme Court has explained, a relevant market analysis "is but a surrogate for detrimental effects" and proof of a reduction in output or other actual anticompetitive effect obviates the need for a detailed market analysis. *See Ind. Fed'n of Dentists*, 476 U.S. at 460-61. Relying on *Indiana Federation of Dentists*, the Seventh Circuit chided the defendants in *Toys "R" Us v. FTC* for failing to recognize that direct evidence of anticompetitive effect obviated the need for market definition:

> [defendant] seems to think that anticompetitive effects in a market cannot be shown unless the plaintiff, or here the Commission, first proves that it has a large market share. This, however, has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration. The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. . . . The other, more conventional way, is by proving relevant product and geographic markets.

221 F.3d 928, 937 (7th Cir. 2000) (internal citations omitted). Other courts have endorsed the use of direct effects evidence in lieu of formal market definition in cases subject to a full rule of reason analysis. *See, e.g., Todd*, 275 F.3d at 207 ("use of anticompetitive effects to demonstrate market power . . . is not limited to 'quick look' or truncated rule of reason cases" and allegations of anticompetitive effects were sufficient

to demonstrate injury to competition); *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 648 (E.D. Mich. 2012) (rule of reason claim not defeated by absence of detailed analysis of relevant market when anticompetitive effects were present).[10]

The ACC's argument that a sports antitrust case requires a full-scale rule of reason analysis misses the mark on several fronts. First, contrary to the ACC's arguments, the Supreme Court did in fact apply the (at that point still unnamed) "quick look" analysis to the antitrust challenge to the NCAA's limitation on university television broadcasts in *NCAA v. Board of Regents*. 468 U.S. at 117. In fact, *NCAA v. Board of Regents* is viewed as the seminal case establishing the quick look. Although the Supreme Court discussed the relevant market, its holding did not require proof of relevant market. Rather, the Court concluded that the NCAA rule was illegal without a complicated economic analysis and that "[a]s a matter of law, the absence of proof of market power does not justify a naked restraint on price or output." *Id.* at 109. Second, courts have applied the quick look in other sports-related cases where the challenged conduct was facially anticompetitive and did not require a lengthy economic analysis. *See, e.g.*, *Law*, 134 F.3d at 1020; *Chi. Prof'l Sports*, 961 F.2d at 674-76.

The antitrust claim here differs significantly from the cases cited by the ACC and from challenges to restrictions of on-field playing rules, eligibility requirements or other

[10] While a quick look analysis is proper here, even if the Court decided after discovery to apply a full rule of reason analysis, Maryland still would not be required to prove a relevant antitrust product market or geographic market once the Withdrawal Penalty's anticompetitive effects are proven directly.

restrictions that were needed if there were to be any league or athletic competition at all.[11] Distinguishing such challenges, in *NCAA v. Board of Regents*, the Supreme Court held that the restriction on television broadcasts did "not . . . fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture" and was therefore subject to the quick look and found unlawful. 468 U.S. at 117. Likewise, Maryland does not challenge here the rules on the field, the number of scholarship players on a team, age-eligibility rules, or recruitment rules; the Complaint specifically states as much. (Compl. ¶ 17.) What Maryland does challenge is the conspiracy of the ACC and its members to thwart competition from other conferences

[11] *See, e.g.*, *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012) (applying a full rule of reason analysis because the procompetitive or anticompetitive effect of the NCAA bylaws at issue, regarding the cap on the number of scholarships per team and prohibition of multi-year scholarships, was not clear at that stage); *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2007) (applying a full rule of reason analysis to NCAA bylaw restricting the number of certified basketball events member institutions could participate in over a certain period); *NHL Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003) (applying a full rule of reason analysis to a hockey league's age-eligibility rules); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (applying a full rule of reason analysis to a conference's transfer rule, which governed any intra-conference transfer by a student-athlete); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 585 (E.D. Pa. 2004) (applying a full rule of reason analysis to NCAA bylaws regarding recruitment of prospective student-athletes, which were "not 'facially' anticompetitive"); *JES Props., Inc. v. USA Equestrian, Inc.*, 253 F. Supp. 2d 1273 (M.D. Fla. 2003) (applying a full rule of reason analysis to an equestrian association's competition rules limiting the permissible distances of various classifications of horse shows); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097 (D. Kan. 1999) (applying a full rule of reason analysis to a NCAA bylaw that restricted the amount of advertising that could appear on uniforms and equipment).

and from ACC members that might compete more effectively in a new conference.[12] (*Id.* ¶¶ 3, 80, 85-88, 90, 104, 106-07.)

The ACC ignores long-standing judicial precedent on quick look analysis and argues that Maryland must identify every possible conference that Maryland might have joined and their geographic locations. (ACC Br. at 17-18.) Even if the Court viewed an allegation on relevant market as necessary for Maryland's complaint (which Maryland disputes and the Supreme Court quick look decisions demonstrate is unnecessary), the Complaint *does* explain the contours of the market,[13] which are sufficiently well-known

[12] The ACC also misapprehends or mischaracterizes a number of the cases on which it relies. For instance, the ACC cites to *National Hockey League Players' Association*, 325 F.3d at 719 for the proposition that all rules employed by professional sports leagues are subject to the Rule of Reason. (ACC Br. at 13.) The quoted language, however, is not the court's holding at all, but rather dicta, lifted from a parenthetical citation to an article. The ACC's citation to *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244, 1251 (D. Utah 1999) suggests that in all instances a determination of whether competition has been restrained requires definition of a relevant market. The language the ACC quotes has nothing to do with the necessity of a market power analysis at the motion to dismiss stage; in fact, Microsoft conceded it had market power in the relevant market. Additionally, *E.I. du Pont de Nemours v. Kolon Industries, Inc.*, 637 F.3d 435, 441 (4th Cir. 2011) is inapplicable because it dealt with a monopolization claim under Section 2 of the Sherman Act and not a horizontal conspiracy among competitors. Naturally, a claim that the defendant has monopolized a market requires allegations defining that market.

[13] *See* market allegations in Compl. ¶¶ 20, 22-30, 50, 85-88, 104-107 (alleging, for example, that the Withdrawal Penalty adversely impacts markets in which conferences compete for member schools, in which universities compete for membership in conferences, in which universities compete for providing educational services and athletic competitions for student athletes, in which universities compete for providing athletic events for consumers of intercollegiate sporting events, and in which universities compete for student-athletes, students, faculty and coaches and that such markets have geographic restrictions based on such factors as travel and historic or regional rivalries.) Given these extensive allegations, even if the Court decides a market needs to be proved,

to the ACC and the Court to permit evaluation of whether the Withdrawal Penalty impairs competition and which must be accepted as true at the motion to dismiss stage. *Ind. Fed'n of Dentists*, 476 U.S. at 460-61. In sum, the quick look analysis applies here, and the Complaint alleges sufficient detail about the relevant markets in any event.

B. The Complaint's Allegations Satisfy Maryland's Pleading Obligations Under the "Quick Look" Approach and State a Claim.

Maryland has more than sufficiently alleged actual anticompetitive effects from the Withdrawal Penalty to satisfy its pleading obligations. As Maryland alleges, universities have witnessed a significant increase in the competition between conferences to recruit and keep the most appealing universities as members. (Compl. ¶¶ 24-27.) In fact, the ACC has been one of the most aggressive recruiters and has recruited Louisville, Pittsburgh, Notre Dame, and Syracuse to join the ACC for all or most sports in the next few years. (*Id.* ¶¶ 10, 30.) What the ACC apparently does not like is when other conferences compete against it to recruit ACC members to join those conferences.

The effect of the restraint at issue here – the Withdrawal Penalty – is a clear restriction on Maryland's ability to compete not only on the field but also in its selection of conference membership and in the recruitment of student-athletes, coaches, sponsors, and fans. (*Id.* ¶¶ 3, 50, 87, 90, 104.) As set forth in the Complaint, the ACC's

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Maryland should be entitled to develop further through discovery and demonstrate at trial the markets in which Maryland and the ACC members and the conference itself compete. *See Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.").

> actions adversely affect competition in the markets in which conferences compete for university members and in which universities compete for membership in conferences. In addition, the ACC's conduct also adversely affects relevant markets for providing educational services and athletic competitions for student-athletes and for providing athletic events for consumers of intercollegiate sporting events. Further, the ACC's conduct reduces competition in the relevant market for coaches of intercollegiate sports. The ACC's conduct distorts the market and adversely affects competition in each of these markets.

(*Id.* ¶ 104.) It requires no complicated economic analysis to see the intended and likely effects of this conspiracy among ACC members that are horizontal competitors with one another and with Maryland. The departure of Maryland to the Big Ten (or of another ACC member to a different conference) would result in a stronger, non-ACC university competing for student-athletes, coaches, sponsors, and fans. Fearing such competition, the ACC members hurriedly and without following the requisite procedures jointly agreed to impose a huge financial penalty that exceeds Maryland's entire athletic budget. (*Id.* ¶¶ 3, 50, 58, 64, 86.) The only logical rationale for this action – and one that Maryland is entitled to explore and develop through discovery – is that the ACC and most of its members wanted to prevent and/or punish Maryland (and any other current ACC member) from leaving the ACC and joining another conference. *See Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 n.10 (2010) ("knowledge of intent may help the court to interpret facts and to predict consequences") (quoting *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)).

The ACC contends that the Withdrawal Penalty is "merely a method of internal governance," (ACC Br. at 20), when in fact its effects are clearly aimed at competition

external to the ACC. The ACC and its co-conspirators seek to impose the largest withdrawal penalty ever in order to prevent Maryland from leaving the ACC, to impede and penalize Maryland for its decision to join the Big Ten Conference, and to deter other institutions from withdrawing from the ACC. (Compl. ¶¶ 3, 50, 54, 85, 86, 88, 90, 104-07.) If successful in crippling Maryland athletics, the ACC members would significantly impair the ability of Maryland to compete for student-athletes, coaches, fans, and sponsors. (*Id.* ¶¶ 50, 75-78, 86-88, 90.) Any argument that a penalty of this magnitude is merely an "internal governance issue" that has no effect on competition ignores "the circumstances, details and logic of [the] restraint." *Cal. Dental*, 476 U.S. at 781.

Neither the adoption of the Withdrawal Penalty nor the ACC's self-help in extracting the Withdrawal Penalty falls within any semblance of a policy or conduct required for the success of any legitimate ACC joint venture activities. (Compl. ¶¶ 3, 61-62, 85.) The Withdrawal Penalty was not created at the formation of the Conference. The $52 million Withdrawal Penalty compared to the fact that the ACC has accepted as little as $2 million as an entry fee demonstrates that the Withdrawal Penalty bears no relationship to any actual harm to the ACC from Maryland's anticipated withdrawal. (*See id.* ¶¶ 31, 85.) In fact, when proposing to triple the Withdrawal Penalty, the ACC executives offered no procompetitive reason for the increase, suggesting only that the Withdrawal Penalty was needed to stop members from leaving the Conference. (*Id.* ¶ 62.)

The fact that the size of the Withdrawal Penalty approximates the total spending by Maryland on *all* of its athletic programs in 2013 demonstrates, on its face, the

anticompetitive intent and the implausibility of any purported justification. (*Id.* ¶¶ 64, 86-87.) The Maryland athletic department has previously made some hard decisions based on budget challenges, (*id.* ¶ 48), so allowing the ACC and its members to impose a $52 million penalty creates a significant risk that Maryland will need to further reduce its programs. (*See id.* ¶¶ 74-78.) The magnitude of the Withdrawal Penalty, a penalty adopted by competing universities that might otherwise compete to seek more appealing, more economically efficient, and more procompetitive memberships in other conferences, reflects an agreement among those competitors to adopt a penalty so great that, as a practical matter, it prevents existing members of the ACC from pursuing affiliations that could lead to increased quality and quantity of intercollegiate athletics. (*Id.* ¶ 88.) As the Complaint makes clear, Maryland alleges genuine, adverse effects on competition. (*See e.g.*, *id.* ¶¶ 86-88, 102-10.) Since the antitrust analysis need only be as detailed as necessary to examine the anticompetitive effects of the restraint, the "quick look" analysis is more than adequate here because "an observer with even a rudimentary understanding of economics could conclude that the [Withdrawal Penalty] would have an anticompetitive effect on customers and markets." *Cal. Dental* 526 U.S. at 770.

C. The Complaint Alleges That The Withdrawal Penalty Results in Injury to Competition.

The Complaint's factual allegations satisfy any need to allege antitrust injury, which is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by

the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also Chi. Prof'l Sports*, 754 F. Supp. at 1352-53 (N.D. Ill. 1991) (finding antitrust injury resulting from NBA's adoption of a limitation on the number of games individual teams could license to broadcast on superstations). The Complaint makes clear that the Withdrawal Penalty injures Maryland as the direct and intended result of the conspirators' attempt to restrict competition among conferences and for universities seeking to affiliate with a more appealing conference. (Compl. ¶¶ 50, 85, 86, 88, 90, 104, 106-07.) In addition, the Complaint alleges that the adoption and implementation of the Withdrawal Penalty also injures student-athletes and other university constituencies. (*Id.* ¶¶ 75, 78, 87, 90, 104.) This, too, is sufficient to allege antitrust injury. *See Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 518 (9th Cir. 1984) (enjoining collegiate association's television broadcasting rule where arrangement "shares the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition").

The ACC's arguments that the Complaint does "nothing more than allege an injury to UMD" and that this is merely a contractual dispute over the $52 million penalty, (ACC Br. at 18-19), flatly ignore the economic realities of the Withdrawal Penalty and its impact on competition between and among universities and conferences. Competition among conferences for member schools, sales of tickets, sale of broadcasting rights, advertising and sponsorships, and opportunities for their members to compete in lucrative athletic contests is real; conference realignment continues to occur with increased frequency. (Compl. ¶¶ 22, 24-25.) This competition and the resulting realignment enable

an academic institution to "enhance its reputation and brand and its ability to attract student-athletes, students, faculty, and coaches." (*Id.* ¶ 26.) Maryland has alleged injuries and threatened injuries flowing from the ACC's conduct denying Maryland and other ACC member institutions a viable, free choice between market alternatives and from participating in some markets altogether. Through the Withdrawal Penalty, the ACC seeks to hinder Maryland's attempts to act in its best competitive interests by moving to the Big Ten, which has had a cognizable effect on Maryland's ability to operate an intercollegiate athletics program. (*See id.* ¶¶ 50, 75-77, 86-88, 90.)[14] It further "prevent[s] other conferences from competing for and offering pro-competitive opportunities to the ACC's current members" and will result in a chilling effect on the ability of intercollegiate athletic conferences to build teams and promote their member institutions." (*Id.* ¶¶ 85, 86, 88; 104-07); *see Regents of Univ. of Cal.*, 747 F.2d at 518.

The inherent flaw in the ACC's antitrust injury argument is perhaps best illustrated if one were to accept its fundamental premise (*i.e.*, that conference withdrawal payments cannot violate the antitrust laws due to lack of antitrust injury (ACC Br. at 18-20)) and to assume that every intercollegiate conference adopted an exit fee as draconian as the challenged Withdrawal Penalty. In that paradigm, the current competition among conferences for member institutions would end and the current membership of

[14] While, as the ACC notes, several schools have decided to join the ACC notwithstanding the existence of the Withdrawal Penalty (presumably under the assumption they will not soon leave the conference), (ACC Br. at 19), it is more telling that not a single school has decided to leave the ACC once it became clear that the ACC would aggressively enforce the Withdrawal Penalty on Maryland.

intercollegiate conferences would be largely frozen because most academic institutions could not incur the financial penalties associated with leaving an existing conference to join another, more appealing and arguably better conference. Universities would be financially trapped in their existing conferences and competition among conferences to recruit new university members would disappear. According to the ACC, that result would cause no antitrust injury despite the elimination of competition. That premise is facially absurd. The fact that Maryland is the first to suffer the effect of the ACC's illegal conduct does not mean that Maryland has not suffered antitrust injury.[15]

The Court should also reject the ACC's attempt to analogize this case to professional sports franchise cases in which a particular investor group, team, or municipality is denied the award or relocation of a franchise. (*See* ACC Br. at 19-20.) The imposition of the Withdrawal Penalty does considerably more than select one city over another or one bidder over a jilted would-be franchisee.[16] Universities and their

[15] It is ironic that the ACC, which benefits from the relative lack of restrictions on Big East teams as the ACC tries to expand, has adopted an exit fee that would have significantly hampered, if not prevented, the ACC's growth if adopted by the Big East.

[16] The ACC cites to various cases dealing with the award of professional franchises or the relocation of existing franchise where the courts found no antitrust injury. The facts of these cases, however, are very different than those here. *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983) (granting the NFL's motion for *summary judgment* because, in part, the plaintiff's exclusion from the league was patently procompetitive and did not restrain the plaintiff from competing by forming a competitive league); *Seattle Totems Hockey Club, Inc. v. NHL*, 783 F.2d 1347 (9th Cir. 1986) (dismissing the plaintiff's antitrust claim based on the NHL's rejection of its attempt to purchase a franchise, as the plaintiffs were seeking to join the league, not compete with it, and were actually granted a conditional franchise but failed to fulfill the conditions precedent); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (dealing

athletic departments differ significantly from the professional sports teams and leagues in the cases the ACC cites. As noted by the Supreme Court in *NCAA v. Board of Regents*, universities are independent economic actors that have an independent economic existence apart from their sports teams. 468 U.S. at 102, 121. The issue here is not which group of investors will be awarded a franchise from a professional sports league, where the losing bidders have no team. Rather, in this time of increasing competition among conferences and universities, both conferences and universities seek alignments that increase their total output in the form of athletic events, opportunities for student-athletes, and quality of educational experience for all their students. Conference realignment creates conferences that are more appealing to intercollegiate athletics fans, which results in greater competition and greater benefits to consumers from the products offered by those conferences. (Compl. ¶¶ 22, 23, 26-27.) The Withdrawal Penalty, which deters current ACC members from moving to other conferences, consequently prevents the potential procompetitive benefits realized and the greater numbers of fans,

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with the essential facilities doctrine and an antitrust dispute between two competing purchasers of an NBA franchise and the defendant's refusal to lease its stadium to the plaintiff after its successful bid to purchase the team); *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974) (granting the NBA's motion for *summary judgment* based, in part, on the fact that the plaintiff challenged the league's decision to reject its offer to purchase an *existing* team).

sponsors, and broadcasters that might be attracted to NCAA athletic events as a result of conference realignment. (*Id.* ¶¶ 85, 90, 107.)[17]

Markets operate most effectively and consumers benefit when competition is robust. The ACC and its members have entered an agreement that hampers and impedes competition, and the harm to Maryland falls well within the type of injury that the antitrust laws were intended to prevent. The Complaint alleges antitrust injury.

III. THE COMPLAINT STATES A CLAIM THAT THE ACC TORTIOUSLY INTERFERED WITH MARYLAND'S ECONOMIC RELATIONSHIPS.

The Complaint states a claim that the ACC has tortiously interfered with Maryland's relationships with the Big Ten Conference, along with its coaches, student-athletes, students, and other third parties. Under Maryland law,[18] the elements of tortious interference with prospective advantage are: "(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the

[17] In addition to the obvious anticompetitive injury to Maryland, the ACC's restraint will reduce output and competition (and therefore opportunities) for student-athletes, intercollegiate athletic programs, coaches, and fans. (Compl. ¶¶ 87, 104, 107.)

[18] Under the doctrine of *lex loci delicti*, Maryland law controls because Maryland has been injured in Maryland: "where the events giving rise to a tort action occur in more than one State, we apply the law of the State where the injury – the last event required to constitute the tort – occurred." *Lab. Corp. of Am. v. Hood*, 395 Md. 608, 615, 911 A.2d 841, 845 (2006). Maryland law applies because Maryland was injured in this State, where its principal place of business is located. *See, e.g., Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 522-23 (M.D.N.C. 2005) (applying Colorado law to tort claims because claimant was injured at its principal place of business in Colorado). Moreover, *B-Line Medical, LLC v. Interactive Digital Solutions, Inc*., 209 Md. App. 22, 26-27, 57 A.3d 1041, 1053 (2012) (cited by the ACC) supports *Maryland's* argument. The plaintiff *B-Line* was ***an Indiana company injured in Indiana*** – dispositive facts that the ACC fails to state. Because IDS was injured in Indiana, the court was *required* to apply Indiana law.

unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." *Natural Design, Inc. v. Rouse Co.*, 302 Md. at 71, 485 A.2d at 675. If Maryland's claim under the Antitrust Act survives, then Maryland's claim for tortious interference with prospective advantage also must survive, and the Court's analysis of Count IV need not proceed further. *Id.* at 74, 485 A.2d at 676.

Maryland's claim, however, does not *depend* on the success of its antitrust claim. Maryland's allegations independently satisfy each element. The *Natural Design* court recognized two types of this tort: where a third party (such as the ACC) induces a breach of contract between two separate parties and, more broadly, where a third party maliciously or wrongfully interferes with another's lawful business and economic relationships. *Id.* at 69, 485 A.2d at 674. "The principle underlying both forms of the tort is the same: under certain circumstances, a party is liable if he interferes with and damages another in his business or occupation." *Id.* Maryland alleges that the ACC intentionally and willfully breached the ACC Constitution by purportedly amending Section IV-5 in September 2012, enforcing the invalid Withdrawal Penalty, and withholding Maryland's ACC revenue distributions before Maryland's withdrawal from the ACC with the "improper purpose" and motive of interfering with Maryland's contractual and economic relations with third parties and "causing damage" to Maryland. (Compl. ¶¶ 50, 114-15.) These actions effectively plead the means selected by the ACC for the purpose of interfering with Maryland's lawful business and contractual relationships with others. *See Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.*, 114

Md. 403, 412-14, 80 A. 48, 49-50 (1911). Under Maryland law, this claim is distinct from Maryland's breach of contract claim and stands on its own.

Maryland alleges that the ACC calculated that its acts would cause damage to Maryland's business. As stated in the Complaint, the ACC intends to "punish Maryland and deter future withdrawals from the Conference" by imposing the Withdrawal Penalty. (Compl. ¶¶ 4, 50.) In addition, Maryland alleges that the ACC has attempted to harm Maryland "by denying Maryland (and its athletic teams) equal treatment and access with respect to ACC meetings, proceedings and decision-making." (*Id.* ¶ 50; *see also* ¶¶ 5, 10, 79-83.) The ACC knew or should have known that its actions would adversely affect Maryland's ability to conduct its business, fund its intercollegiate athletic programs, compete effectively, undermine Maryland's financial relationships with third-parties, and damage Maryland by forcing it to "operate at a deficit in 2013." (*Id.* ¶¶ 73-78.)

As shown, the Complaint alleges that the ACC acted intentionally with the requisite "unlawful purpose" to damage Maryland in the conduct of its lawful business, with purpose and motive to interfere with Maryland's future relationship with the Big Ten Conference and with Maryland's relationships to its student-athletes, athletic teams, coaches, and to cause actual damage and loss. This is tortious interference. *See Natural Design*, 302 Md. at 69, 485 A.2d at 674; *Knickerbocker*, 114 Md. at 414, 80 A. at 50. Maryland's injuries are not a mere incident of the ACC's action – they are the "***motive or purpose***" of the ACC's intentional breach of the ACC Constitution. *Id.* at 72 n.12, 485 A.2d at 675 n.12 (emphasis added). Count IV states a claim.

IV. MARYLAND'S CLAIMS ARE PROPERLY LITIGATED IN THIS COURT, WHICH IS NEITHER "INCONVENIENT" NOR SUBORDINATE TO THE ACC'S TACTICAL, NARROW (AND NOW STAYED) DECLARATORY JUDGMENT ACTION.

Recognizing that Maryland's Complaint does in fact state claims for violation of the Antitrust Act, breach of contract, and tortious interference, the ACC offers a litany of reasons why this Court should nonetheless defer or stay this action in light of the ACC's declaratory judgment action in North Carolina, the tactical product of the ACC's race to the courthouse. None has merit.

The law is clear that the "first-filed" status of the North Carolina action carries no weight, because the ACC seeks only a narrow declaratory judgment that will not address or resolve the substantive claims Maryland has pleaded here. In addition, the notion that this Court – a stone's throw away from the University of Maryland, where the ACC and its member institutions visit repeatedly for athletic competitions – is somehow "inconvenient" is baseless. The State of Maryland has a strong and fundamental interest in providing a forum for its citizens to remedy injuries suffered in Maryland under Maryland law, in particular, the Antitrust Act. That interest is heightened here because an instrumentality of the State seeks access to the State's own courts. Nothing the ACC offers overcomes that fundamental interest or requires dismissal or stay of this action. That is particularly true now that the ACC's North Carolina action has been stayed pending appeal. Given that fact and the real possibility that the North Carolina action will ultimately be dismissed for lack of personal jurisdiction, literally no reason exists to dismiss or stay this action.

A. While Temporally "First," the ACC's Narrow Declaratory Judgment Action Provides No Basis to Disregard Maryland's Choice of Forum.

The ACC concedes that without "unusual and compelling circumstances, a declaratory judgment action is inappropriate where the same issue is pending in another jurisdiction." (ACC Br. at 31 (quoting *Waicker v. Colbert*, 347 Md. 108, 113, 649 A.2d 426, 428 (1997)). Yet, the ACC wants this Court to deny Maryland its choice of forum and to subordinate this suit (with four claims, seeking both coercive and declaratory relief) to the ACC's declaratory-only North Carolina action. The ACC's only real point is that it arrived at a courthouse first. That is far from enough. Declaratory-only suits are routinely brushed aside where a more comprehensive suit has been filed *or* is anticipated. *See, e.g.*, *Waicker*, 347 Md. at 114-16, 699 A.2d at 428-30 (deriding use of declaratory judgments to subvert traditional actions in equity or at law and dismissing a declaratory-only action in favor of action for coercive relief); *see also Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 258 (4th Cir. 1996) (dismissing a declaratory-only action in favor of a subsequently-filed suit where "issuance of a declaratory judgment would settle part of the controversy between the [parties, but] certainly would not settle the entire matter" and litigation filed elsewhere "on the other hand, could resolve all issues"); *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937) (declaratory suits should not be entertained for "trying issues involved in cases already pending, . . . or for the purpose of anticipating the trial of an issue in a court of co-ordinate jurisdiction" or "to try a controversy by piecemeal, or to try particular issues without settling the entire controversy"). There is no reason for this Court to dismiss this action, one that would

resolve all issues, in favor of the ACC's declaratory judgment action (now stayed) in North Carolina.[19]

Declaratory judgments are a different breed. As their purpose is practical, courts exercise discretion in deciding whether even to entertain them, declining to do so unless they serve a useful purpose in resolving an entire controversy between the parties. *Polakoff v. Hampton*, 148 Md. App. 13, 27, 32, 810 A.2d 1029, 1037-40 (2002) (declining declaratory suit where only action between parties). These purposes are explicitly recognized in Maryland's adoption of the Uniform Declaratory Judgments Act. Md. Code Ann., Cts. & Jud. Proc. § 3-409(a).[20] Even in the absence of *any* existing coercive suit between the parties, preemptory declaratory-only relief is "inappropriate" where "'more effective relief can and should be granted in another proceeding,'" *i.e.*, a later suit including coercive relief. *Polakoff*, 148 Md. App. at 33, 810 A.2d at 1040. In

[19] Strangely, the ACC attempts to turn declaratory judgment jurisprudence on its head by latching onto the fact that the Maryland Complaint includes, along with antitrust, contract, and tort claims, a claim for declaratory relief. (ACC Br. at 29-33.) While Maryland seeks, *inter alia*, declaratory relief, this suit is not a declaratory judgment action that is subject to the jurisprudence reflecting the disfavored status of declaratory-only actions. The ACC's action is. That *this* suit may encompass the much narrower relief sought in North Carolina is a point in Maryland's favor.

[20] These principles are not unique to Maryland; North Carolina follows them as well. "The declaratory remedy should not be invoked to try a controversy by piecemeal, or to try particular issues without settling the entire controversy. This is especially so where a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy." *Coca-Cola Bottling Co. v. Durham Coca-Cola Bottling Co.*, 541 S.E.2d 157, 163 (N.C. Ct. App. 2000). North Carolina, too, has adopted the Uniform Declaratory Judgments Act. N.C.G.S. § 1-257.

deciding whether to hear a declaratory suit in light of the potential for a second, coercive suit by the defendant, Maryland courts consider the following:

> [1] whether the proceeding will terminate the controversy between the parties or will otherwise settle or clarify their conflicting legal positions; [2] whether going forward with the declaratory judgment case will negatively affect the rights of any party, by permitting procedural fencing or other tactical strategies, including those designed to prevent the party who traditionally would be the tort plaintiff from choosing the time and place of suit, or wresting control of the prospective litigation from him; and [3] whether the parties' controversy can be more effectively and efficiently decided by the alternate remedy of a common-law tort action.

Id. at 37, 129 A.2d at 1042-43 (upholding as proper the refusal to entertain jurisdiction over declaratory-judgment action); *see also Grand Trunk W. R.R. v. Consol. Rail Corp*, 746 F.2d 323, 326 (6th Cir. 1984) (discussing federal factors later followed by *Polakoff*). Here, each factor weighs against the declaratory-only action filed in North Carolina and against granting a stay or dismissal in this Court.

First, the ACC's suit is declaratory-only and seeks the narrow remedy of a "declar[ation] that the Section IV-5 of the ACC's Constitution . . . is a valid and enforceable contractual term and that defendant Maryland is subject to the withdrawal payment of $52,266,342." (Ex. A, North Carolina Compl. ¶ 42.) The ACC asserts that "there can be little question" that the North Carolina suit will "operate as a bar to this action once it is reduced to judgment." (ACC Br. at 30.) But this is incorrect, even assuming the now-stayed North Carolina action ever proceeds. Mirroring the disfavored nature of declaratory-only suits, "a declaratory action determines only what it actually decides and does not have claim preclusive effect on other contentions that might have

been advanced." Restatement (Second) of Judgments § 33, cmt. c (1982); *see also* 22A Am. Jur. 2d *Declaratory Judgments* § 248 (2013). Since the ACC's suit is for declaratory relief only, it would only be given preclusive effect for the precise contractual issues involved. *See Bankers & Shippers Ins. Co. v. Electro Enters.*, 287 Md. 641, 653-54, 415 A.2d 278, 285 (1980); *In re Estate of Cox*, 388 S.E.2d 199, 201 (N.C. Ct. App. 1990).[21] Therefore, were the North Carolina litigation to go forward, it could and would not resolve Maryland's claims here for breach of contract against the ACC, much less its claims for violations of the Antitrust Act or for tortious interference under Maryland law. (Compl. ¶ 96, *et seq.*) This is true regardless of the outcome of the North Carolina suit, but it is enough that if the ACC's relief is denied, the dispute will persist and, thus, that it cannot be said *now* that that action will "necessarily terminate the controversy between the parties and thereby serve a useful purpose." *Polakoff*, 148 Md. App. at 37-38, 810 A.2d at 1043.

Second, Maryland would be negatively affected if the ACC's preemptive and premature strike were rewarded. Maryland's tort and antitrust claims are governed by Maryland law, and, as the natural plaintiff for each of its claims seeking coercive relief,

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[21] This explains the ACC's incorrect assertion that Maryland would have an "obligation" to bring counterclaims in the North Carolina suit. (ACC Br. at 32.) North Carolina's Rule 13(a) regarding compulsory counterclaims is subject to "specific statutory or judicially determined exception[s]," *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 614 S.E.2d 268, 271 (N.C. 2005) (citing Restatement (Second) of Judgments § 22 (1982)), such as the declaratory judgment exception, which explicitly "is also applicable with respect to a counterclaim that, in any other type of action, would be barred by § 22." Restatement (Second) of Judgments § 33, cmt. (c); *see also Allan Block Corp. v. Cnty. Materials Corp.*, 512 F.3d 912, 915-16 (7th Cir. 2008).

Maryland's choice of timing and forum cannot be lightly disregarded. These interests are only amplified by the still-pending issues of personal jurisdiction and sovereign immunity being hotly litigated in North Carolina. Unlike the ACC's declaratory suit, the litigation filed by Maryland in this Court was precipitated by the ACC engagement of self-help remedies and its mistreatment of Maryland, not for tactical reasons, and it promises to address the full panoply of disputes between the parties.

Finally, and of immediate import here, the claims for coercive and declaratory relief before this Court are just the type of "alternate remedy" – in the words of *Polakoff* – that will resolve the full body of the parties' disputes more effectively and efficiently than the declaratory-only suit in North Carolina.[22] All of the parties are here, as is the full set of claims. Given these basic facts, the date of the ACC's filing is of very little weight, if any.

With some temerity, the ACC asks this Court to apply principles of comity – while it has vigorously argued against application of just such principles in the North Carolina courts. (Ex. D, ACC North Carolina Mem. Opp. Maryland's Mot. to Dismiss, at 7-14.)

[22] North Carolina courts agree. In considering whether to entertain first-filed declaratory suits or subsequently-filed actions in a different forum, North Carolina, like Maryland, demands that the declaratory-only suit promise to settle the entire controversy and resolve all issues, expressing particular wariness for such suits "where a separate suit has been filed, *or is likely to be filed*, that will more fully encompass the scope of the entire controversy." *Coca-Cola Bottling Co.*, 541 S.E.2d at 163 (emphasis added). Even more explicitly, "priority should not necessarily be given to the declaratory suit simply because it was filed earlier." *Id.* at 164.

To the extent that the ACC's invocation of comity is relevant,[23] the sparse authorities that it cites demand that "the two actions be materially the same," *State v. 91st St. Joint Venture*, 330 Md. 620, 629, 625 A.2d 953, 957 (1993) (citing *Preston v. Poe*, 116 Md. 1, 5, 81 A. 178, 179 (1911) (finding later-filed action may not be subject to stay given "a material difference between the theories and purposes of the two suits under consideration")), and that courts consider the practical limitations on "the likelihood of obtaining complete relief in the foreign jurisdiction," whether the action will have significant *res judicata* effect and whether the foreign action is at a preliminary or an advanced stage. *Apenyo*, 202 Md. App. at 413, 32 A.3d at 518. Further, while "priority [in filing] may well be a factor to be weighed" in comity doctrine consideration, "judicial discretion is . . . the only practical answer to the problem and . . . the question of comity should be treated on a case to case basis with the end in view of ascertaining what is just and equitable between the parties under all the particular circumstances." *Roggenkamp v. Roggenkamp*, 25 Md. App. 243, 251, 333 A.2d 374, 378-79 (1975) (refusing to recognize a foreign state's prior anti-suit injunction and stay a related action filed in Maryland). The ACC fails to cite any authority applying comity in favor of a declaratory-only suit, and all of these factors weigh heavily against deference to such a suit. The ACC points to

[23] The cases the ACC relies on for principles of "comity" do not involve coordinate actions in different states in the US. *See Apenyo v. Apenyo*, 202 Md. App. 401, 32 A.3d 511 (2011) (divorce case in which first action filed in courts of Ghana); *91st St. Joint Venture*, 330 Md. at 629 A.2d at 957 (1993) (actions for injunctive relief filed in different Maryland counties).

no reasons why this Court should consider "comity" other than it reached the North Carolina courthouse first with a very narrow complaint.

Finally, it is far from clear that the North Carolina court can even decide the ACC's narrow declaratory judgment action. The North Carolina action currently is stayed pending appeal of personal-jurisdiction and sovereign-immunity issues. Even if the North Carolina court *can* decide the matter, it is by no means certain that it *will*, rather than deferring to this comprehensive action that will resolve all of the disputes between Maryland and the ACC. There is no prudent reason to halt this action – one in which jurisdiction is secure and all claims can assuredly be resolved.

B. There is Nothing "Inconvenient" About Litigating Maryland's Claims in this Court.

In a last ditch effort to avoid this Court's jurisdiction, the ACC invokes the doctrine of *forum non conveniens*. (ACC Br. at 29-33.) There is nothing inconvenient about litigating Maryland's claims here, and the interests of substantial justice do not require dismissal or stay. To the contrary, they compel that Maryland's choice of forum be respected; that choice is not to be lightly disturbed. *Leung v. Nunes*, 354 Md. 217, 224, 729 A.2d 956, 959-60 (1999).

Section 6-104 of the Courts & Judicial Proceedings Article provides: "If a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers just." "[A] court 'must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private

concerns, come under the heading of 'the interest of justice.'" *Leung*, 354 Md. at 224, 729 A.2d at 959 (interpreting Md. Rule 2-327). Private interests include "the relative ease of access to sources of proof," the "availability of compulsory process for attendance of unwilling witnesses," "the cost of obtaining attendance of willing witnesses," and other practical considerations. *Murray v. Transcare Md., Inc.*, 203 Md. App. 172, 192, 37 A.3d 987, 999 (2012). Public interests of justice also embraces "broad citizen concerns" such as Maryland's "educational system" and, with particular relevance to this action, "considerations of court congestion" and the "local interest in the matter at hand." *Id.* at 192-93, 37 A.3d at 999. The ACC must overcome a "heavy burden" to establish that the balance of private and public factors "weighs strongly" in favor of deferring to the North Carolina court. *Leung*, 354 Md. at 229, 729 A.2d at 962. By contrast, when "at best, the balancing of factors produces an equipoise, . . . the plaintiff's choice of forum controls." *Id.*

The ACC cannot meet that burden. Both the private and public interest factors overwhelmingly favor respecting Maryland's choice of forum. This case involves Maryland's *substantive* claims that will be governed by Maryland law because Maryland's injuries occurred in *Maryland*. *Hood*, 395 Md. at 615, 911 A.2d at 845. Maryland seeks to resolve multiple claims governed by Maryland law in this action, and there is no persuasive reason to deny Maryland's access to its own courts. The entire dispute between Maryland and the ACC can be resolved in this Court, which eliminates the necessity of multiple cases pending in multiple courts, reduces the burdens on the parties and the courts, and insulates against conflicting judicial rulings. As in *Jones v.*

Prince George's County, "Maryland obviously has strong interests in this action. Denying the plaintiffs access to the courts of this State implicates important public policy considerations." 378 Md. 98, 121, 835 A.2d 632, 646 (2003). The interests of justice strongly support Maryland's choice to bring this action in Maryland.

The ACC focuses almost solely on the convenience to the ACC's witnesses and the ACC itself, arguing that its witnesses all reside in North Carolina. But Maryland's witnesses reside here, and Maryland's choice of forum cannot "be altered solely because it is more convenient" for the ACC to litigate in North Carolina. *Leung*, 354 Md. at 224, 729 A.2d at 960. And the ACC cannot plausibly claim this is an inconvenient forum. Access to proof is relatively easy in this case (mainly document production and testimony from witnesses located at Maryland, the ACC, and the ACC member schools), and it would not be any easier or less costly if this action proceeded in North Carolina. Indeed, ACC officials, members, and teams, frequently travel to the University of Maryland for athletic contests and conference events. It is absurd for the ACC to suggest that this Court, which is less than 25 miles away from the University of Maryland, is somehow "inconvenient." At any rate, the ACC's witnesses will not often need to travel to this Court. Fortunately, when they do, there are three major airports located within a one-hour drive to this Court (and Reagan National Airport is only thirty minutes away). The same cannot be said for Greensboro, North Carolina, where the North Carolina action was filed.

Although the ACC's headquarters are in North Carolina, its current and future member institutions, whose representatives may be witnesses, are located up and down

the East Coast, from Massachusetts to Florida and in almost every state between. Just like any other complex case involving witnesses located in foreign states, Maryland can obtain necessary evidence where the witnesses are located through subpoenas issued to witnesses located in those jurisdictions and subject to process there (as the ACC surely knows).[24]

The State of Maryland has a substantial private and public interest in this case, and this Court is a convenient forum for the parties and witnesses. The ACC did not even come close to meeting its "heavy burden" to show that the balance of relevant factors "weighs strongly" in its favor. In fact, the ACC did not even fight this issue to a draw. Yet, even if the Court finds that the ACC managed to reach "equipoise," the ACC's motion still must be denied. *Leung*, 354 Md. at 229, 729 A.2d at 962.

[24] Incredibly, the ACC suggests that it either cannot or will not ensure that its own witnesses will appear live at a trial in Maryland. (ACC Br. at 28-29.) Yet, if Maryland does not object to lacking subpoena power to bring the ACC's witnesses to Maryland, why should the ACC complain? Putting aside that inane argument, the Court need not worry about whether Maryland will be able to secure evidence. Maryland law permits both Maryland and the ACC to obtain evidence from out-of-state witnesses for use at trial. Indeed, the ACC has moved this Court to suspend the ACC's efforts to obtain such evidence pending the outcome of this motion.

CONCLUSION

For all of these reasons, the ACC's motion should be denied in its entirety.

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REQUEST FOR HEARING

Plaintiffs respectfully request a hearing on Defendant's Motion to Dismiss or, Alternatively, to Stay Complaint and Plaintiffs' opposition thereto.

John J. Kuchno

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2013, a true and correct copy of the foregoing was transmitted via electronic mail and mailed first-class, postage prepaid, to:

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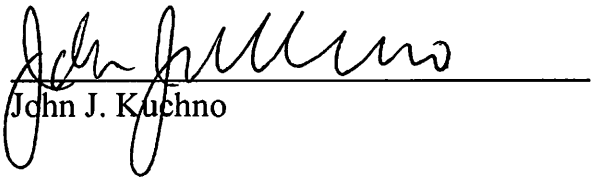

John J. Kuchno

EXHIBIT A

OKatz 11/08/2012 @ 4:24

STATE OF NORTH CAROLINA

File No. 12CVS10736

Guilford County

In The General Court of Justice
☐ District ☒ Superior Court Division

Name of Plaintiff
Atlantic Coast Conference

Address

City, State, Zip

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3, 4

VERSUS

Name of Defendant(s)
University of Maryland, College Park and
Board of Regents, University System of Maryland

Date Original Summons Issued

Date(s) Subsequent Summon(es) Issued

To Each of The Defendant(s) Named Below:

Name And Address of Defendant 1
Board of Regents, University System of Maryland
c/o Maryland Attorney General, Douglas F. Gansler
200 St. Paul Place
Baltimore, MD 21202

Name And Address of Defendant 2

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address of Plaintiff's Attorney (If None, Address of Plaintiff)
D. Clark Smith, Jr.
SMITH MOORE LEATHERWOOD LLP
PO Box 21927
Greensboro, NC 27420

Date Issued 11-26-12 *Time* 3:42 ☐ AM ☒ PM

Signature

☒ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk of Superior Court*

☐ ENDORSEMENT (ASSESS FEE)

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date of Endorsement *Time* ☐ AM ☐ PM

Signature

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk of Superior Court*

NOTE TO PARTIES: *Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	*Time Served* ☐ AM ☐ PM	*Name of Defendant*

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	*Time Served* ☐ AM ☐ PM	*Name of Defendant*

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to person named below.

Name And Address of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason.

Service Fee Paid $	*Signature of Deputy Sheriff Making Return*
Date Received	*Name of Sheriff (Type or Print)*
Date of Return	*County of Sheriff*

STATE OF NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 10736

ATLANTIC COAST CONFERENCE,

Plaintiff,

vs.

UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND,

Defendants.

COMPLAINT
(Jury Trial Requested)

Plaintiff Atlantic Coast Conference ("ACC" or "Conference"), complaining of defendants University of Maryland, College Park ("Maryland") and the Board of Regents, University System of Maryland ("Board of Regents"), alleges and says:

THE PARTIES

1. Plaintiff ACC is an unincorporated nonprofit association organized and existing under the laws of North Carolina, and with its principal place of business in Greensboro, North Carolina.

2. The ACC is comprised of twelve members that are institutions of higher education. In addition to defendant Maryland, the members are Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Miami, The University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University.

3. As an unincorporated nonprofit association, the ACC is its own legal entity duly authorized by statute to assert claims in its name on behalf of its members. One or more of its members have standing to assert in their own right the claim or claims asserted herein. The interests the ACC seeks to protect herein are germane to its purposes, and neither the claim or claims asserted herein nor the relief requested requires the participation of any particular member of the ACC as a party other than defendant Maryland.

4. Defendant Maryland is a university with its principal place of business in College Park, Maryland, organized and existing under the laws of the State of Maryland. Defendant Maryland is a member of the North Carolina unincorporated nonprofit association that is the ACC, and has been a member at all times since the founding of the ACC in 1953 in Guilford County, North Carolina.

5. The Board of Regents governs the University System of Maryland, of which defendant Maryland is a constituent institution. The Board of Regents takes certain official actions on behalf of defendant Maryland, including the actions described herein.

JURISDICTION

6. This court has the authority to grant the relief requested in this Complaint pursuant to N.C. Gen. Stat. § 1-253 et seq. and Rule 57 of the North Carolina Rules of Civil Procedure.

7. Defendants are subject to the jurisdiction of this Court pursuant to, *inter alia*, N.C. Gen. Stat. § 1-75.4 and the Constitution of the United States.

BACKGROUND

8. The Constitution of the ACC (the "Constitution") is a contract by and among the member institutions, pursuant to which the members have agreed to conduct the business affairs of the ACC.

9. Plaintiff ACC is organized by and operates pursuant to the Constitution and Bylaws.

10. The Constitution and Bylaws are governed by North Carolina law.

11. Article VII of the Constitution grants the complete responsibility for and authority over the ACC to the Council of Presidents, comprised of the chief executive officer from each member institution.

12. Each member has agreed, and each member has relied on the agreements of the other members, to be bound by votes of the Council of Presidents.

13. Specifically, defendant Maryland has agreed to be bound by votes taken by the Council of Presidents.

14. The Constitution of the ACC provides that upon notice of withdrawal from the association of members, a withdrawing member shall be subject to a withdrawal payment in an amount "equal to three (3) times the total operating budget of the Conference (including any contingency included therein), approved in accordance with Section V-1 of the Conference Bylaws, which is in effect as of the date of the official notice of withdrawal."

15. This provision of the Constitution requiring payment of the withdrawal amount and its immediate effective date were adopted by the duly authorized, binding, sufficient and effective vote of the Council of Presidents of the ACC member institutions

in North Carolina during the September 11-12, 2012 meeting of the Council of Presidents.

16. The members of the ACC are bound by the vote of the Council of Presidents during the September 11-12, 2012 meeting of the Council of Presidents.

17. The foregoing vote of the Council of Presidents in North Carolina followed discussion and consideration by the Council of Presidents, including the President of defendant Maryland, Dr. Wallace D. Loh. Over the course of more than a year, Dr. Loh freely participated in discussions and votes among members of the Council of Presidents regarding the withdrawal payment due to the ACC if any member were to withdraw from the Conference.

18. Dr. Loh, acting as the agent and representative of defendant Maryland, voluntarily consented to and participated, without objection, in the discussion and vote by and among the Council of Presidents during their September 11-12 meeting concerning the immediate establishment of the withdrawal payment at three times the annual operating budget of the ACC (although defendant Maryland did not vote in favor).

19. The Council of Presidents incorporated the withdrawal payment provision into the Constitution because it provides some measure of financial protection against potential damages and losses for members of the ACC that remain after withdrawal by one or more other members.

20. As the governing body of the common enterprise that generates substantial revenue on which the member institutions rely each year, and in light of the revenue of each member based on its involvement and activities with the other members of the ACC,

the Council of Presidents deemed it reasonable and necessary to provide some relief for the prospective and substantial harm caused by withdrawal.

21. The Council of Presidents, following consideration of the types and amounts of financial and other harm that would potentially occur in the event of a member's withdrawal, concluded that the sum of three times the annual operating budget of the ACC was a fair and reasonable approximation of the potential financial and other harm resulting from withdrawal.

22. The Council of Presidents previously had addressed the issue of a withdrawal payment on September 13-14, 2011. Following discussion at that meeting of potential harm resulting from withdrawal, the Council of Presidents adopted a proposal by Dr. Loh at that meeting to establish the withdrawal payment at one and one-quarter times the total operating budget of the ACC. The Council of Presidents unanimously voted on September 13, 2011 to amend the Constitution to establish the withdrawal payment at the amount proposed in discussion by Dr. Loh.

23. Following the September 2011 vote, the potential harm to ACC member institutions in the event of the withdrawal of one or more members of the Conference substantially increased. The September 11, 2012 amendment to the Constitution increasing the withdrawal payment to three times the annual operating budget of the ACC resulted from further assessment of the potential harm for Conference members in the event of withdrawal and from additional changes related to the structure of collegiate athletics.

24. The annual operating budget of the ACC for the 2012-2013 year is $17,422,114. The withdrawal payment to which a member is subject upon withdrawal between July 1, 2012 and June 30, 2013 is $52,266,342.

25. On or about November 19, 2012, following a vote, the Board of Regents endorsed, approved and authorized defendant Maryland's withdrawal from the ACC and, further, to join the Big Ten Conference, which was described by Dr. Loh as "a watershed moment for the University of Maryland."

26. On November 19, 2012, defendant Maryland conducted a public press conference, led by Dr. Loh, announcing and discussing its decision to withdraw from the ACC.

27. Dr. Loh, on behalf of and as the authorized agent of defendant Maryland, officially provided notice of Maryland's withdrawal to the Commissioner of the ACC on November 19, 2012.

28. The Big Ten Conference on or about November 19, 2012 published statements welcoming defendant Maryland to the Big Ten Conference.

29. In apparent reliance on the withdrawal of defendant Maryland from the ACC, and the decision of defendant Maryland to join the Big Ten Conference, the Big Ten Conference immediately agreed thereafter to accept as a new member Rutgers, The State University of New Jersey.

30. Following defendant Maryland's public announcement and Dr. Loh officially providing notice to the ACC of its withdrawal, defendant Maryland has become subject to the withdrawal payment of $52,266,342.

31. Despite having participated in the vote to amend the Constitution two months earlier, Dr. Loh has distanced Maryland publicly from any commitment to pay the withdrawal payment as set forth in the Constitution.

32. In public statements, Dr. Loh, on behalf of defendant Maryland, has referred to the withdrawal payment as "illegal" and indicated his contention that it is unenforceable.

33. Dr. Loh, on behalf of defendant Maryland, has also stated publicly regarding the withdrawal payment that it raises issues "for a court to decide" and is "illegal."

34. When asked directly whether defendant Maryland intends to pay the withdrawal payment, Dr. Loh, on behalf of defendant Maryland, has refused to provide assurance that defendant Maryland will do so and has made it clear that defendant Maryland does not intend to pay the amount provided by the ACC's Constitution.

35. Upon information and belief, Dr. Loh has asserted on other occasions that defendant Maryland will not pay the full amount of the withdrawal payment as provided by the ACC's Constitution.

CLAIM FOR DECLARATORY RELIEF

36. The ACC re-alleges and incorporates by reference the allegations set forth in the preceding paragraphs.

37. An actual controversy has arisen between the ACC and Defendants over the validity and enforceability of the provisions of the Constitution that make defendant Maryland subject to the withdrawal payment.

38. This is an action seeking a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 et seq., determining the relative rights, liabilities and obligations of the ACC and defendant Maryland pursuant to Section IV-5 of the ACC's Constitution.

39. The ACC, as an unincorporated nonprofit association, is duly authorized by each member of the ACC to pursue legal action to enforce the rights of members against one or more other members related to duties and obligations owed to the ACC. Each member other than defendant Maryland has specifically authorized the ACC to act in that capacity in this Action.

40. A genuine controversy exists between the parties. Defendant Maryland has indicated its belief that Section IV-5 of the ACC's Constitution, as amended on or about September 11, 2012, is invalid and unenforceable. A declaratory judgment from this Court will clarify and settle the validity and enforceability of the withdrawal payment at issue and will afford relief from the controversy and dispute created by defendant Maryland's assertion that the withdrawal payment is invalid and unenforceable.

41. Additionally, through public and private statements, defendant Maryland has indicated that it does not intend to pay the amount provided by the ACC's Constitution.

42. The ACC is entitled to a declaratory judgment by the Court determining and declaring that the Section IV-5 of the ACC's Constitution, requiring payment by any withdrawing member of the withdrawal payment, is a valid and enforceable contractual term and that defendant Maryland is subject to the withdrawal payment of $52,266,342.

WHEREFORE, Plaintiff ACC respectfully prays unto the Court as follows:

1. That the Court declare that the provision of Section IV-5 of plaintiff ACC's Constitution regarding the withdrawal payment owed by any member institution of the ACC that gives notice of withdrawal from the Conference is valid and enforceable;

2. That the Court declare that, pursuant to Section IV-5 of plaintiff ACC's Constitution, the University of Maryland is subject to a withdrawal payment in the amount of $52,266,342, in light of the actions taken by the defendants;

3. That plaintiff ACC recover its costs, including reasonable attorneys' fees, as may be provided by law;

4. That any and all issues so triable be tried by a jury; and

5. That plaintiff ACC have such other and further relief as the Court may deem just and proper.

This the 26th day of November, 2012.

SMITH MOORE LEATHERWOOD LLP

D. Clark Smith, Jr.
N.C. State Bar No. 6853
Alan W. Duncan
N.C. State Bar No. 8736
Alexander L. Maultsby
N.C. State Bar No. 18317
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Attorneys for Plaintiff Atlantic Coast Conference

OF COUNSEL:

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Elizabeth M. Mitchell
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Telephone: (617) 523-2700
Facsimile: (617) 523-6850

EXHIBIT B

STATE OF NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 10736

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND,

Defendants.

ORDER

THIS CAUSE COMING ON TO BE HEARD and being heard before the Undersigned at the February 18, 2013 Civil Session of the General Court of Justice, Superior Court Division, Guilford County, North Carolina on the motion of Defendants to dismiss this action on the grounds that this Court should, in its discretion, extend comity to the laws of the State of Maryland with regard to the doctrine of Sovereign Immunity as may be applicable to the Defendants; and after reviewing the Complaint, reviewing the parties' briefs and materials submitted to the Court, and considering the arguments of counsel, the Court is of the opinion and so finds, in its discretion and based on the facts and law applicable to this action, that it will not extend comity in this action and thereby denies Defendants' motion to dismiss.

CC emailed Attys

WHEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants' motion to dismiss is hereby DENIED.

This the 22 day of February, 2013.

The Honorable John O. Craig, III
Superior Court Judge Presiding

EXHIBIT C

North Carolina Court of Appeals

JOHN H. CONNELL, Clerk

Fax: (919) 831-3615
Web: http://www.nccourts.org

Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. P13-253

**ATLANTIC COAST CONFERENCE,
PLAINTIFF,**

V.

**UNIVERSITY OF MARYLAND,
COLLEGE PARK; BOARD OF
REGENTS, UNIVERSITY SYSTEM OF
MARYLAND,
DEFENDANTS.**

From Guilford
(12CVS10736)

ORDER

The following order was entered:

The petition for writ of supersedeas filed by the defendants in this cause on 4 April 2013 is allowed. All further trial court proceedings in the above captioned matter are hereby stayed pending the disposition of defendants' appeal from the order entered 25 February 2013 by Judge John O. Craig, III, which denied defendants' motion to dismiss.

By order of the Court this the 18th of April 2013.

The above order is therefore certified to the Clerk of the Superior Court, Guilford County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 18th day of April 2013.

John H. Connell
Clerk, North Carolina Court of Appeals

Copy to:
Mr. J. Alexander S. Barrett, Attorney at Law, For University of Maryland, et al
Mr. D. Clark Smith, Jr., Attorney at Law
Mr. Alexander L. Maultsby, Attorney at Law
Mr. Alan W. Duncan, Attorney at Law
Mr. James D. Smeallie, Attorney at Law
Ms. Elizabeth M. Mitchell, Attorney at Law
Mr. Benjamin M. McGovern, Attorney at Law
Hon. David L. Churchill, Clerk of Superior Court

EXHIBIT D

SMITH MOORE LEATHERWOOD

February 14, 2013

VIA HAND DELIVERY

The Honorable Joe O. Craig, III
Superior Court Judges Chambers
Guilford County Courthouse
Greensboro, North Carolina

Re: The Atlantic Coast Conference v. University of Maryland *et al.*

Dear Judge Craig:

In advance of the hearing on the Defendants' Motion to Dismiss, on the calendar for Monday, February 18, 2013, we are providing a copy for Your Honor of the ACC's Memorandum in Opposition to Defendants' Motion to Dismiss, with selected cases cited in our Memorandum.

With kindest personal regards, I am

Very truly yours,

Alan W. Duncan

Alan W. Duncan

AWD/dg

Enclosure

cc: J. Alexander S. Barrett (via hand delivery)

Direct 336.378.5315 | Fax 336.378.5400 | alan.duncan@smithmoorelaw.com
Smith Moore Leatherwood LLP ▪ Attorneys at Law ▪ www.smithmoorelaw.com
300 North Greene Street Suite 1400 PO Box 21927 (27420) Greensboro, NC 27401 ▪ 336.378.5200
Atlanta, GA ▪ Charleston, SC ▪ Charlotte, NC ▪ Greensboro, NC ▪ Greenville, SC ▪ Raleigh, NC ▪ Wilmington, NC

STATE OF NORTH CAROLINA GUILFORD COUNTY ATLANTIC COAST CONFERENCE, Plaintiff, v. UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND, Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12 CVS 10736 **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff Atlantic Coast Conference ("the ACC") submits this Memorandum of Law in Opposition to the Motion to Dismiss of Defendants University of Maryland, College Park ("Maryland") and Board of Regents, University System of Maryland ("Board of Regents") (collectively "Defendants").

I. NATURE OF THE MATTER BEFORE THE COURT

The ACC filed this action on November 26, 2012 seeking a declaratory judgment from this Court as to the rights and obligations of the parties under a contract, the Constitution of the Atlantic Coast Conference. Following Defendants' motion for an extension of time to respond to the ACC's Complaint, this Court by Order dated December 31, 2012, allowed Defendants until January 28, 2013 to respond. On January 18, 2013, Defendants filed a Motion to Dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, stating merely that "this action must be dismissed for lack of personal jurisdiction, based upon the sovereign immunity of the State of Maryland." Although Rule 7(b) of the North Carolina Rules of

Civil Procedure requires that the grounds for their Motion be stated with particularity, their Motion is otherwise silent. The Office of the Attorney General for the State of Maryland, Douglas Gansler, issued a press release to announce the filing of the Motion, stating that "a North Carolina court has no jurisdiction over the sovereign state of Maryland and its public universities" and that "a court of a sister state cannot compel another sovereign state to submit to that court's jurisdiction." A copy of this press release is attached as Exhibit A. [1]

Despite his assertion that North Carolina "cannot compel" another State "to submit to [its] jurisdiction," the Attorney General, on the very same day, initiated Defendants' own action in the state court of Maryland (the "Maryland Action"). A copy of the Maryland Action is attached as Exhibit B. Count One of the Maryland Action seeks a declaratory judgment as to the mean of certain rights under the ACC Constitution, which is, presumably, an argument that Defendants would also assert as a defense in this Action in North Carolina. Count Two of the Maryland Action asserts a breach of contract claim based on alleged violations of the ACC Constitution.

II. FACTS RELEVANT TO THIS MOTION

The ACC is an unincorporated nonprofit association organized and existing under the laws of North Carolina with its principal place of business in Greensboro, North Carolina. (Complt. ¶ 1) Maryland is a university with its principal place of business in College Park, Maryland, organized and existing under the laws of the State of Maryland. Maryland is a member of the ACC. It has been a member of this North Carolina

[1] In ruling on motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), the trial court may consider matters outside the pleadings without converting the motion into one for summary judgment. *See Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 102, 545 S.E.2d 243, 247 (2001).

association since the founding of the ACC in 1953 in Guilford County, North Carolina. (Complt. ¶ 4) The Board of Regents governs the University System of Maryland, of which defendant Maryland is a constituent institution. (Complt. ¶ 5)

The ACC is organized by and operates pursuant to its Constitution and Bylaws. (Complt. ¶ 9) The Constitution is a contract by and among the member institutions, pursuant to which the members have agreed to conduct the business affairs of the ACC. (Complt. ¶ 8; Maryland Action ¶ 51, 97) The Constitution is governed by North Carolina law, and Article VII of the Constitution grants the complete responsibility for and authority over the ACC to the Council of Presidents, comprised of the chief executive officer from each member institution. (Complt. ¶¶ 10-11)

On September 11-12, 2012, the Council of Presidents, including Maryland's President, Dr. Wallace Loh, convened in Chapel Hill, North Carolina. There, the Council voted to amend the Constitution to provide that upon a member's notice of withdrawal from the ACC, the withdrawing member shall be subject to a withdrawal payment to the ACC in an amount "equal to three (3) times the total operating budget of the Conference . . ." (Complt. ¶¶ 15, 21, 23). The annual operating budget of the ACC for the 2012-2013 year is $17,422,114. (Complt. ¶ 24). The payment owed by a member that withdraws between July 1, 2012 and June 30, 2013 is therefore $52,266,342. *Id.* All acts necessary to amend the Constitution occurred in North Carolina. (Complt. ¶ 14-21).

Two months later, on November 19, 2012, the Defendants endorsed, approved and authorized Defendant Maryland's withdrawal from the ACC and acceptance of an invitation to join the Big Ten Conference. (Complt. ¶ 25). Dr. Loh officially provided notice of Maryland's withdrawal to the Commissioner of the ACC on November 19,

2012. (Complt. ¶¶ 27). Upon Maryland's providing notice to the ACC of its withdrawal, Maryland became subject to the withdrawal payment of $52,266,342. (Complt. ¶ 30).

Before the ACC instituted this action, Maryland publicly stated its position that it would refuse to pay the entire withdrawal payment. (Complt. ¶¶ 31-35) Again, at the very same time they filed the instant Motion to Dismiss, the Defendants also filed the Maryland Action, attempting to place before the Maryland state court all of the factual and legal issues presented in this North Carolina action. These include the contract at issue, which was entered into in North Carolina for the purpose of forming the ACC, a North Carolina entity, all of the acts surrounding the formation of the contractual amendment at the center of this case, which acts also occurred in North Carolina, performance of the contract, which is due in North Carolina by way of payment to a North Carolina unincorporated association, and the application of North Carolina law, which governs the contract claim at issue.

III. ARGUMENT

A. North Carolina Courts Have Personal Jurisdiction Over Defendants.

The Defendants contend that the State of North Carolina has no authority to assert personal jurisdiction over them based on the alleged sovereign immunity of the State of Maryland. More specifically, their public statements assert that they cannot be sued in any court outside the State of Maryland. This argument is wholly without merit. In fact, it is plainly contradicted by the holding of the United States Supreme Court in *Nevada v. Hall*, 440 U.S. 410 (1979), and the reaffirmation of that holding in *Alden v. Maine*, 527 U.S. 706 (1999).

In *Nevada v. Hall*, the plaintiffs were California residents injured in an automobile accident in California caused by an employee of the University of Nevada who was driving a car owned by the State of Nevada while engaged in the business of the State of Nevada. 440 U.S. at 411. Neither party disputed that the University of Nevada was an instrumentality of the State of Nevada. *Id.* The plaintiffs filed a tort action against the University of Nevada and the State of Nevada in California state court. *Id.* at 411-12. A jury awarded the plaintiffs $1,150,000.00 in damages. After exhausting appeals at the state level, the State of Nevada and the University of Nevada put before the United States Supreme Court the question of whether a State may claim sovereign immunity from suit in courts of another State. *Id.* at 413-14.

The Supreme Court analyzed the question presented based on "(1) the source and scope of the traditional doctrine of sovereign immunity; (2) the impact of the doctrine on the framing of the Constitution; (3) the Full Faith and Credit Clause; and (4) other aspects of the Constitution that qualify the sovereignty of the several states." *Id.* at 414. The Court acknowledged that tort claims of more than $25,000 against the University of Nevada and the State of Nevada were in fact barred in Nevada itself under the doctrine of sovereign immunity, because Nevada had not waived sovereign immunity beyond $25,000 for tort claims. Even though Nevada protected itself from such liability in its own state under the sovereign immunity doctrine, the Court concluded that the State of California was free to enforce *its* laws against the State of Nevada. *Id.* at 426. The Supreme Court therefore affirmed the judgment of the California state courts in favor of plaintiffs, holding that "[n]othing in the Federal Constitution authorizes or obligates [the

Supreme Court] to frustrate [the policy of the State of California] out of enforced respect for the sovereignty of Nevada." *Id.*

Applied here, North Carolina courts are absolutely *not* prevented from exercising jurisdiction over Defendants and applying North Carolina contract law to Defendants, who voluntarily entered into an unincorporated association with public institutions and others in North Carolina and engaged in significant commercial activities for their own benefit in this State. The grounds for Defendants' Motion—that this action "must be dismissed for lack of personal jurisdiction, based on the sovereign immunity of the State of Maryland"—contradicts the fundamental Supreme Court precedent of *Hall*.[2]

Two decades after *Hall*, the Supreme Court reaffirmed its holding in *Alden v. Maine*, 527 U.S. 706 (1999). In that case, the Court addressed the question of whether Congress had the power to enact substantive laws (there, the Fair Labor Standards Act) that would allow individuals to bring private suits against a State in that State's court. 527 U.S. at 712, 730. In analyzing that issue, the Court stated again that one State may entertain a suit against another State in the courts of the first State. The Court noted that while a particular State might not be subject to suit in its own courts without consent, that concept of sovereign immunity differs from the concept of whether one sovereign State can be sued in the courts of another sovereign State. *Id.* at 738-39. Absent an agreement between the two states, nothing bars Nevada, for example, from being sued in California, *id.* at 738, or bars Maryland from being sued in North Carolina.

[2] It is worth noting that the ACC disputes both of the foundational elements the Defendants would need to establish to place the question of sovereign immunity before this Court. Specifically, the ACC disputes: (1) that there is immunity even in Maryland itself for the contract claims at issue in this Action (see *infra* at 14-17), or (2) that the Defendants are in fact instrumentalities of the State of Maryland (see *infra* at 17-18). Nonetheless, these two issues are immaterial to the fundamental rule in *Hall*—which is that North Carolina has the power to exercise jurisdiction over Maryland.

The North Carolina Court of Appeals recently addressed this same issue in a lawsuit brought in North Carolina against the University of Virginia. *Cox v. Roach*, __ N.C. App. __, 723 S.E. 2d 340 (2012), *review denied*, No. 101P12, 2013 WL 363009 (N.C. Jan. 24, 2013). After discussing both *Hall* and *Alden*, the court stated clearly that "North Carolina courts are *not* required to respect Virginia's claim of sovereign immunity." *Id.* at __, 723 S.E. 2d at 345 (emphasis added). The State of Maryland's own courts recognize the rule, too; according to the Maryland Court of Appeals, pursuant to *Hall* "a Maryland court need not recognize the governmental immunity of another state or of a municipal corporation or political subdivision outside of Maryland." *Hansford v. Dist. of Columbia*, 617 A.2d 1057, 1068 (Md. 1993).

Plainly, then, just as the State of California could entertain a suit in its own court by a California resident against the University of Nevada and the State of Nevada, this Court has jurisdiction over Defendants in this suit brought by a North Carolina entity regarding activity in North Carolina to amend a North Carolina contract. Plaintiff's motion to dismiss on the ground that North Carolina does not have such authority over Defendants is meritless and therefore should be denied.

B. This Is Not a Case for Extending Comity to the State of Maryland.

Any comity argument for extending sovereign immunity requires at least two factors, neither of which is present here. First, the law in the foreign jurisdiction must provide for sovereign immunity there, which, as discussed below (see *infra* at 14-18), Maryland does not do for the dispute at issue. Second, and perhaps even more importantly, for a North Carolina court to recognize and apply another State's law, that law must not offend the public policy of the State of North Carolina. Thus, extending comity in any case is not "a matter of absolute obligation." *Southern v. Southern*, 43

N.C. App. 159, 161-62, 258 S.E.2d 422, 424 (1979) (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). Rather, comity "rests in the discretion of the courts," *Sainz v. Sainz*, 36 N.C. App. 744, 749, 245 S.E.2d 372, 375 (1978), and does not require a North Carolina court to reach the same conclusion that another State's court might reach. *In re Will of Lamb*, 303 N.C. 452, 456, 279 S.E.2d 781, 784 (1981). In fact, "foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum." *Davis*, 269 N.C. at 125, 152 S.E.2d at 310; *see also Sainz*, 36 N.C. App. at 749, 245 S.E.2d at 375 ("No state will enforce a foreign law contrary to its public policy."). For example, the North Carolina Court of Appeals refused to enforce a South Carolina statute that was in "direct conflict with the settled statutory policy of this State" because North Carolina "courts are not required to extend comity to the law of another state where that law is contrary to the public policy of this state." *Robinson v. Leach*, 133 N.C. App. 436, 439, 514 S.E.2d 567, 569 (N.C. App. 1999).

On the facts of this case, and as described more fully below, extending immunity to the Defendants in this North Carolina Action would contradict the public policy of the State of North Carolina in several ways.

1. The Law of North Carolina Does Not Recognize Sovereign Immunity for Contract Claims.

The established rule in North Carolina is that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Martinez v. Univ. of N.C.*, No. COA12–396, 2012 WL 5846330, at *2 (N.C. Ct. App. Nov. 30, 2012) (quoting *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976)). Indeed, our Supreme Court has made it clear that "the doctrine of

sovereign immunity will not be a defense to the State" and that "[t]he State will occupy the same position as any other litigant" in contract actions. *Smith*, 289 N.C. at 320, 222 S.E.2d at 424.

In deciding to abolish the defense of sovereign immunity for the State on contract actions, the North Carolina Supreme Court did so for several public policy reasons. *Smith*, 289 N.C. 303, 222 S.E.2d 412. The Court there stated:

> The courts which have held a state implicitly consents to be sued upon any valid contract into which it enters were moved by the following considerations: (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body 'bad faith and shoddiness' foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.
>
> We too are moved by the foregoing considerations. We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State.

Id. at 320, 222 S.E.2d at 423-24. According to the North Carolina Supreme Court, then, extending sovereign immunity in a contract case violates multiple fundamental public policies of the State.

Thus, it is now "well established" pursuant to the public policy of the State of North Carolina that sovereign immunity "is not a proper defense in suits arising from contract law." *RS&M Appraisal Servs., Inc. v. Alamance Cnty.*, No. COA10–1194, 2011 WL 2848789, at *2 (N.C. Ct. App. July 19, 2011) (quoting *Peverall v. Cnty. of Alamance*, 154 N.C. App. 426, 430, 573 S.E.2d 517, 520 (2002)). Sovereign immunity is inapplicable whether the contractual commitment is created by express agreement or by statute. *Brown v. N.C. Dep't of Env't & Natural Res.*, 714 S.E.2d 154, 158 (N.C. Ct. App. 2011). Even suit by a third party to a contract, if it is an intended beneficiary of the contract, is not barred by the doctrine of sovereign immunity. *Carl v. State*, 192 N.C. App. 544, 553, 665 S.E.2d 787, 795 (2008). Therefore, if this case had been brought against the University of North Carolina, the University would "not [be] entitled to special privileges" because "[w]hen a State consents to be sued or waives its governmental immunity, it occupies the same position as any other litigant, and a plaintiff has the same right that he would have to sue an ordinary person." *Lyon & Sons v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27-28, 76 S.E.2d 553, 556 (1953). Thus, North Carolina has a clear public policy as it relates to the application of sovereign immunity to contract claims: North Carolina does not recognize it.

The case of *Cox v. Roach*, __ N.C. App. __, 723 S.E. 2d 340 (2012) *review denied*, No. 101P12, 2013 WL 363009 (N.C. Jan. 24, 2013), is instructive here. In *Cox*, the plaintiffs filed suit against the University of Virginia and others, alleging tort claims—not contract claims—stemming from the arrest of the plaintiffs (who allegedly stole medical documents from the radiology department at the University). *Id.* at __, 723 S.E. 2d at 342-44. The North Carolina court recognized that the University of Virginia

was entitled to sovereign immunity for such *tort* claims in its home State: "[a]s an agency of the Commonwealth, UVA is entitled to sovereign immunity under the common law absent an express constitutional or statutory provision to the contrary. There is no such waiver in the Act or elsewhere." *Id.* at __, 723 S.E. at 345 (*quoting Rector & Visitors v. Carter*, 267 Va. 242, 591 S.E. 2d 76, 78 (2004)). The court also concluded that recognizing such immunity in tort cases would not be against the public policy of the State of North Carolina, which also extends sovereign immunity to its own public universities for tort claims. *Id.* (*citing Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 165 567 S.E. 2d 215, 217 (2002) (barring tort claims for conversion and property damage against the University of North Carolina Chapel Hill on the grounds of sovereign immunity)).

The holding in *Kawai*, as relied upon in *Cox*, is important. In *Kawai*, the University of North Carolina-Chapel Hill had been sued for breach of contract and for the torts of conversion and property damage. 152 N.C. App. at 164-65, 567 S.E. 2d at 217. The North Carolina Court of Appeals dismissed the *tort* claims on the basis of the sovereign immunity of the University of North Carolina-Chapel Hill. As to the *contract* claim, however, the Court specifically cited the public policy concerns stated in *Smith* and said:

> We note that this appeal concerns only the claims for conversion and damage to property. The University did not seek to dismiss the claim against it for breach of contract, correctly noting that the doctrine of sovereign immunity does not bar such a suit. "[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State,* 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Our Supreme Court emphasized, however, that " [t]his decision has no application to the

> doctrine of sovereign immunity as it relates to the State's liability for torts." *Id.* at 322, 222 S.E.2d at 424

Id. at 163, 166-67, 567 S.E.2d at 218 (internal quotations and citations omitted, emphasis added). Thus, because the claims in *Cox* sounded in tort, and not contract, the court determined that to exercise comity in recognition of Virginia's sovereign immunity for tort claims would not be against the public policy of the State of North Carolina.

Cox and *Kawai* both illustrate why the Defendants' Motion must fail here. The *Cox* court applied the doctrine of sovereign immunity because there was no dispute that the University of Virginia would have been immune from suit on the tort claims had the action been brought in the courts of Virginia and because North Carolina public policy would not be offended since North Carolina also extends sovereign immunity to its own public universities for tort claims. Here, it is just the opposite on both counts. The University of Maryland would not have been immune from suit on the ACC's contract claim had the action been brought in the courts of Maryland (see *infra* at 14-18), and North Carolina does not extend immunity to its own public institutions in contract cases, as discussed in *Kawai*.

2. North Carolina's public policy recognizing that the State's citizens are entitled to a forum for relief has been similarly applied to reject a sovereign immunity defense in a intercollegiate athletics conference realignment case.

In the only case of athletics conference realignment and sovereign immunity, *The Big East Conference v. West Virginia University*, No. PB 11-6391, 2011 WL 6933720 (R.I. Super. Ct. Dec. 27, 2011)(copy attached), the Rhode Island court rejected the defendant's efforts to avoid suit in a foreign jurisdiction for reasons that parallel public policy concerns in North Carolina. In that case, The Big East Conference filed a complaint against West Virginia University ("WVU") in the state courts of Rhode Island,

where the conference is headquartered. *Id.* The Big East's complaint sought to enforce the withdrawal provision of the conference's bylaws after WVU announced its intention to leave the Big East and join another athletic conference. *Id.* WVU moved to dismiss the Big East's complaint, arguing, *inter alia*, that WVU was entitled to sovereign immunity under West Virginia law. *Id.* WVU urged the Rhode Island court to apply the law of West Virginia under the principles of comity. *Id.*

The Rhode Island court rejected WVU's argument. The court noted that pursuant to *Nevada v. Hall*, it was not required to recognize WVU's claimed immunity in West Virginia. *Id.* Further, the Rhode Island court did not decline to exercise its jurisdictional authority, explaining that "a court may decline to apply sovereign immunity under principles of comity to the state university of a sister state when to do so would leave the forum state's residents without redress in their state." *Id.* In the view of the Rhode Island court, "[r]esidents of a state cannot be left without redress in their state, particularly when their allegations are related to commercial activities within their state." *Id.* Because extending comity would have violated Rhode Island's public policy of providing its citizens with a forum for relief, the court refused to extend sovereign immunity to WVU. *Id.*

Similarly, as stated by the North Carolina Supreme Court in *Corum v. Univ. of North Carolina*, "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [in the North Carolina Constitution]." 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992). One of those such rights is that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy

by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art I, § 18. North Carolina courts have already decided as a matter of public policy that the courts should be open to its citizens in contract claims against the State. In fact, North Carolina public policy could not be more clear on this very point. As enunciated in *State v. Smith*, *supra* at 9, to extend sovereign immunity in this case would equate to a denial of "due process" and "judicial sanction of the highest type of governmental tyranny."

C. There Is No Sovereign Immunity Under Maryland Law for the Claim Asserted by the ACC.

As indicated above, a prerequisite to a North Carolina court exercising comity in extending sovereign immunity to another State, it must also be clear that the law of that other state actually affords the immunity sought by the defendant in the first place. Here, it appears that Defendants would *not* be entitled to immunity under Maryland law for the claim brought against them by the ACC. The State of Maryland has statutorily abolished the defense of sovereign immunity for the State in contract actions. Further, it is not clear under the facts of this case that the Defendants should even be considered an arm of the State for sovereign immunity purposes.

1. Maryland has abolished sovereign immunity for instrumentalities of the State in contract cases like this one.

The Maryland legislature has abolished sovereign immunity for breach of express contracts. By statute, "the State [of Maryland], its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract . . . ." Md. Code Ann. State Gov't § 12-201(a). Despite what its own legislature has said, the Defendants are now raising precisely that defense. Since passage

of this statute, "it has not been an adequate defense to a contract claim for the State simply to say, 'the King has changed his mind.'" *Md. Transp. Auth. Police Lodge #34 of the Fraternal Order of Police, Inc. v. Md. Transp. Auth.*, 5 A.3d 1174, 1223 (Md. Ct. Spec. App. 2010), *rev'd on other grounds by* 21 A.3d 1095 (Md. 2010). Thus, Maryland courts have relied on this statute to enforce contractual provisions against the State of Maryland and its agencies. *See, e.g.*, *Beka Indus., Inc. v. Worcester Cnty. Bd. of Educ.*, 18 A.3d 890, 899 (Md. 2011) (holding that the board of education had waived sovereign immunity on a school construction contract); *Mooney v. Univ. Sys. of Md.*, 943 A.2d 108, 112 (Md. Ct. Spec. App. 2008) (finding waiver of sovereign immunity in a dispute over a security interest), *rev'd on other grounds by* 966 A.2d 418 (Md. 2009); *QC Corp. v. Md. Port Admin.*, 510 A.2d 1101, 1106 (Md. Ct. Spec. App. 1986) (refusing to restrict the waiver to procurement contracts because the statute was intended "to achieve a broad waiver of immunity"), *rev'd in part on other grounds* 529 A.2d 829 (Md. 1987); *Md. Port Admin. v. CJ Langenfelder & Son, Inc.*, 438 A.2d 1374, 1382 (Md. Ct. Spec. App. 1982) (finding that the statute waived sovereign immunity not only for a contract but also interest gained thereon).

As the Maryland courts have explained, "[t]he General Assembly [of Maryland] was well aware of the problem of overbreadth and the possible fiscal impact of a waiver upon State agencies." *Md. Port Admin.*, 438 A.2d at 1382. Nevertheless, the Maryland legislature expressly waived sovereign immunity in contract actions. Indeed, the preamble to the statute explains that "the Governor's Commission to Study Sovereign Immunity believes that there exists a moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a

contract." *QC Corp.*, 510 A.2d at 1104.

Even before the statutory waiver, Maryland courts had restricted the role of sovereign immunity in some contractual instances, recognizing the perversion of allowing the State to enter into agreements that could never be enforced. Thus, in *State v. Dashiell*, the highest court in Maryland explained that "when the State enters into a contract with constitutional authority, it acquires rights and incurs responsibilities like those of any individuals who are parties to such a contract." 75 A.2d 348, 355 (Md. 1950). Indeed, "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Id.* (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)).

The ACC's only claim in this case is one for declaration by this Court of the parties' rights under North Carolina contract law. There is no dispute that the relevant contract is the ACC Constitution and that Maryland is a party to that contract. In the Maryland Action, for example, Maryland and the Board of Regents themselves state that "[t]he ACC Constitution constitutes a contract to which Maryland, the ACC and the remaining members of the ACC are parties." As the Maryland legislature and courts have clearly determined, there is no immunity for the Defendants in their home forum for breach of contract cases. As such, any instrumentality of the State of Maryland, which the Defendants here claim to be, is subject to having the courts of Maryland adjudicate their rights and obligations under contracts, and even to award damages in the event of breach.

The Defendants' Motion seeking dismissal on the grounds of sovereign immunity seeks greater protection in North Carolina than they would be entitled to receive in their

own sovereign territory. While there are multiple grounds for denying the Defendants' Motion, this fact alone is sufficient to do so and to require the Defendants to appear before this Court to determine their rights and obligations under the ACC Constitution.

2. It is unclear that the Defendants are entitled to treatment as instrumentalities of the State of Maryland.

It is not at all clear that Defendants should be considered "arms of the state" under the facts presented in this case, which is a prerequisite to any immunity argument. Under Maryland law, sovereign immunity only applies to the state itself or a state agency that functions as an arm of the state. *Bd. of Educ. v. Zimmer-Rubert*, 973 A.2d 233, 236 (Md. 2009). In determining whether an entity is considered an arm of the state, "[t]he principal factor, upon which courts have virtually always relied, is whether the state treasury will be responsible for paying any judgment that might be awarded against the entity." *Zimmer-Rubert v. Bd. of Educ.*, 947 A.2d 135, 139 (Md. Ct. Spec. App. 2008) (citing *Lewis v. Bd. of Educ.*, 262 F. Supp. 2d 608, 612 (D. Md. 2003)), *aff'd*, 973 A.2d 233 (Md. 2009); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (explaining that "the vulnerability of the State's purse" is "the most salient factor" in determining sovereign immunity).

Maryland has acknowledged in the Maryland Action and elsewhere that the University's intercollegiate athletics programs "*must* be self-sustaining and self-supporting and may not receive any tuition funds or state appropriations." (Ex. B at ¶ 2 (emphasis added); *see also* "President Loh's Response to the Presidents Commission on Intercollegiate Athletics," November 21, 2011, www.president.umd.edu/PCIA ("Maryland Athletics does not receive state fund, as do some other public universities.") (President Loh's Response is attached as Exhibit C) At his press conference on

November 19, 2012, to announce Maryland's withdrawal from the ACC, President Loh announced that no taxpayer money would be used to fund the withdrawal payment. (See Exhibit D) Thus, by Defendants' own admissions, state funds will not be responsible for paying Athletics Department debts or the withdrawal payment owed to the ACC. Because funds from the State of Maryland are not at issue, but rather funds from the "self-sustaining and self-supporting" Maryland Athletics Department are implicated, the Defendants should not be considered "arms of the state." Therefore, the Defendants are not entitled to sovereign immunity even in the courts of Maryland, or anywhere else.

D. Summary

Defendants' Motion contradicts *Nevada v. Hall* and the waiver of sovereign immunity for contract claims that has been established clearly in both Maryland and North Carolina, revealing the Motion for what it is—merely an effort to move this case to Maryland. As discussed above, when the Defendants filed their Motion to Dismiss they also filed suit in their home forum, raising there the very claim they now say they are immune from having to defend here. Defendants cannot have it both ways. They make their Motion not because they are immune, but to avoid this Court's authority, despite all of their commercial activity in North Carolina, their sixty-year membership in a North Carolina unincorporated association with public and private North Carolina institutions as fellow members, their presence and participation in North Carolina in the amendment process that is at issue in the case, their status as a party to the North Carolina contract that is at issue, the application of North Carolina law to the legal issues presented, and their history of agreements that they would pay a withdrawal amount to the North Carolina unincorporated association in the event they departed it.

In sum, the Supreme Court of the United States has ruled that a State like Maryland is not immune from suit in another State, and North Carolina courts have the power and authority to hear cases like this one. The legislature of Maryland has declared that there is no sovereign immunity for the types of claims at issue here, and Maryland courts have consistently applied that rule to allow contract claims against the State of Maryland. The legislature and courts of North Carolina have made it clear that North Carolina's fundamental public policy is to refuse to apply sovereign immunity to contract claims. Moreover, it is altogether unclear that the Defendants, on the facts of this case, are acting as instrumentalities of the State in the first place, given their pronouncements in and out of court that no State funds may be used to satisfy any of their contractual obligations at issue. In the only case of similar facts involving a public institution's departure from an athletics conference, the court did not grant sovereign immunity to the foreign State, even where the claim (unlike here) was one from which that State would have been immune in its home forum. Simply put, Defendants' Motion thoroughly lacks merit and should be denied.

V. CONCLUSION

For the foregoing reasons, plaintiff The Atlantic Coast Conference respectfully requests that Defendants' Motion to Dismiss be denied.

This the 14th day of February, 2013.

Alan W. Duncan

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Counsel for Plaintiff The Atlantic Coast Conference

NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 10736

ATLANTIC COAST CONFERENCE,

Plaintiff,

v.

UNIVERSITY OF MARYLAND, COLLEGE PARK; BOARD OF REGENTS, UNIVERSITY SYSTEM OF MARYLAND

Defendants.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Defendants in the above-captioned action with a copy of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss via hand-delivery to:

J. Alexander S. Barrett
Jason B. Buckland
Hagan Davis Mangum Barrett & Langley
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Suite 200
Greensboro, NC 27401

This 14th day of February, 2013.

Alan W. Duncan

Alan W. Duncan
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For Immediate Release

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Attorney General Gansler Files Antitrust Action in Prince George's County Against the Atlantic Coast Conference

Maryland moves to dismiss ACC's lawsuit in North Carolina

Baltimore, MD (Jan. 18, 2013) - Attorney General Douglas F. Gansler announced today that he has taken two legal actions to ensure that Maryland courts will hear and decide whether the Atlantic Coast Conference (ACC) violated antitrust laws and other obligations by seeking to impose an excessive $53 million withdrawal penalty for Maryland's pending departure to the Big Ten Conference. First, Attorney General Gansler has filed a complaint on behalf of the Board of Regents of the University System of Maryland and the University of Maryland, alleging that the so-called "exit fee" is an illegal restraint of trade in violation of antitrust laws. Second, Attorney General Gansler has moved to dismiss the ACC's hastily filed state court action in North Carolina, arguing that a North Carolina court has no jurisdiction over the sovereign state of Maryland and its public universities.

"Our lawsuit calls the ACC's 'exit fee' what it really is - an antitrust violation and an illegal penalty," said Attorney General Gansler. "Our motion in North Carolina will ensure that a Maryland court will rule on the case."

On November 19, 2012, the University of Maryland announced that it would join the Big Ten Conference, beginning in 2014. As the lawsuit explains, the move will not only provide financial security for Maryland's athletic programs and will also enhance the University's educational and research opportunities through membership in the Committee on Institutional Cooperation, a premier academic consortium of the Big Ten universities and the University of Chicago.

Shortly after the announcement, the ACC sued in North Carolina state court to enforce a withdrawal penalty of $52.26 million, supposedly provided for in the ACC Constitution. Maryland has moved to dismiss that action because a court of a sister state cannot compel another sovereign state to submit to that court's jurisdiction.

Attorney General Gansler's lawsuit in Prince George's County Circuit Court alleges that the ACC violated Maryland antitrust laws, breached contractual obligations and tortiously interfered with the prospective economic advantage of the flagship campus of the University of Maryland System. The lawsuit seeks an injunction against enforcement of the

exit fee, a declaratory judgment finding the fee unlawful and treble damages under the antitrust laws, along with other relief.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF MARYLAND, 3300 Metzerott Road Adelphi, Maryland 20783	*	IN THE
	*	CIRCUIT COURT
	*	FOR
and	*	PRINCE GEORGE'S COUNTY
	*	
UNIVERSITY OF MARYLAND, COLLEGE PARK, Main Administration Building College Park, Maryland 20742	*	
	*	
	*	Case No. CAL13-02189
Plaintiffs,	*	
v.	*	
ATLANTIC COAST CONFERENCE, 4512 Weybridge Lane Greensboro, North Carolina 27407 Serve on: John D. Swofford Commissioner 4512 Weybridge Lane Greensboro, North Carolina 27407	*	
	*	
	*	
	*	
	*	
Defendant.	*	

Clerk of the Circuit Court
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* * * * * * * * *

COMPLAINT

The Board of Regents of the University System of Maryland ("Board of Regents") and the University of Maryland, College Park ("Maryland"), Plaintiffs, by their counsel, sue the Atlantic Coast Conference ("ACC"), and state:

INTRODUCTION

1. Maryland has been a member of the ACC since the founding of the Conference in 1953. Despite this long and proud history, facing significant economic challenges in its athletic department, evaluating the impact of the radical realignment of colleges and universities in the country's major athletic conferences that has occurred over the past several years, and committed to providing its students and faculty with the highest level of academic, educational, and research opportunities, on November 19, 2012, Maryland publicly announced its intention to join the Big Ten Conference beginning on July 1, 2014.

2. The move to the Big Ten Conference will provide financial security to, and permit Maryland to sustain, its intercollegiate athletic programs, which must be self-sustaining and self-supporting and may not receive any tuition funds or state appropriations. The move will also significantly enhance the academic, educational, and research opportunities available to Maryland's students and faculty. Joining the Big Ten Conference will enable Maryland to become a member of the Committee on Institutional Cooperation ("CIC"), a premier consortium of outstanding institutions comprised of the Big Ten universities and the University of Chicago. Membership in the CIC will significantly enrich research and collaboration opportunities for Maryland's students and faculty and thereby enhance Maryland's ability to attract and retain exceptional students and top-notch faculty. While a break with tradition is never easy, Maryland's decision to join the Big Ten Conference in 2014 is in the best interests of its students, student-athletes, and faculty, as well as the taxpayers of the State of Maryland.

3. Nonetheless, immediately after Maryland's announcement, the ACC took steps designed to deny Maryland these athletic, academic, and financial benefits and to penalize Maryland for its decision, with the goal of impeding Maryland and deterring other members

from leaving the Conference. Specifically, the ACC imposed on Maryland a withdrawal penalty of $52.26 million (the "Withdrawal Penalty") purportedly authorized by the ACC Constitution and Bylaws (collectively, the "ACC Constitution"). The ACC claims that the Withdrawal Penalty constitutes "liquidated damages." In fact, the Withdrawal Penalty bears no relation to actual damages (if any) to the ACC from Maryland's withdrawal. To the contrary, the ACC nearly tripled the penalty for leaving the conference, without basis, analysis or justification, in September 2012 (shortly before Maryland's announcement) through a purported amendment to the ACC Constitution. In addition to lacking any legitimate economic justification, that amendment, which Maryland and one other ACC member institution opposed, failed to comply with the notice and procedural requirements of the ACC Constitution and is therefore null and void.

4. The ACC has also ignored and breached the ACC Constitution in its urgency to punish Maryland and deter further withdrawals from the Conference. By its plain terms, the ACC Constitution provides that amendments do not take effect until the beginning of the next fiscal year *following* their adoption. Even if the September 2012 increase in the Withdrawal Penalty had been validly adopted (and it was not), that amendment could not take effect until July 1, 2013. Nonetheless, the ACC purported to apply the September 2012 amendment and imposed the Withdrawal Penalty immediately by withholding from Maryland more than $3 million of Maryland's share of conference revenues, and by making clear its intention to withhold *all* future conference revenues due to Maryland until the Withdrawal Penalty is paid in full.

5. The ACC has also penalized Maryland by excluding it from participation in Conference meetings and by barring its coaches from participation in meetings dealing with

competition, scheduling, and planning with respect to individual sports. The ACC has done all this even though Maryland remains a member of the ACC. The ACC's actions are unlawful and tortious, and constitute an illegal restraint of trade. The ACC's illegal, retaliatory, and anticompetitive conduct threatens irreparable harm to Maryland's student-athletes, student and alumni fan base, faculty, athletic competitiveness, and reputation.

6. Maryland brings this action to prevent this harm and to force the ACC to adhere to its legal obligations, including the contractual obligations arising from the ACC Constitution. Maryland seeks a declaratory judgment pursuant to § 3-406 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland for the purpose of determining a question of actual controversy between the parties. Maryland also seeks compensatory and punitive damages to remedy the ACC's breach of contract and the ACC's tortious interference with prospective economic advantage, and an award of treble damages, civil penalties, injunctive relief, and attorneys' fees and costs to remedy the ACC's violations of the Maryland Antitrust Act, Md. Code Ann., Commercial Law §§ 11-204, 11-209.

PARTIES

7. The Board of Regents is the governing body of the University System of Maryland and controls the affairs of the University of Maryland, College Park. The Board of Regents is an instrumentality of the State of Maryland. Title 12 of the Education Article of the Annotated Code of Maryland establishes the University System of Maryland as an instrumentality of the State of Maryland to "foster the development of a consolidated system of public higher education, to improve the quality of education, to extend its benefits, and to encourage the economical use of the State's resources." The offices of the University System of

Maryland are located in Adelphi, in Prince George's County, and the Board of Regents conducts meetings there.

8. Maryland is the flagship institution within the University System of Maryland. College Park is located in Prince George's County.

9. Defendant ACC is an unincorporated association that governs, regulates and promotes, through the sale of television broadcasting rights, sponsorships, and other promotional benefits, certain intercollegiate athletic competitions among its member institutions, generating substantial revenues. The Conference currently consists of 12 member institutions of higher education from seven States, including the State of Maryland. The current members of the Conference are Maryland, Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology ("Georgia Tech"), University of Miami, University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University ("Virginia Tech"), and Wake Forest University. Each of these institutions is a member of the ACC unincorporated association and a participant in this joint venture.

10. Even though the ACC seeks to impede, punish, and penalize Maryland for its decision to join the Big Ten Conference, the ACC has been a very active participant with respect to the significant realignment of the country's major athletic conferences that has taken place during the past several years. Specifically, Syracuse University and the University of Pittsburgh will withdraw from the Big East Conference to join the ACC in 2013. The ACC has also announced that the University of Notre Dame will join as a participant in all Conference-sponsored sports with the exception of football, for which it will play five ACC teams per season. And, in a meeting from which Maryland was excluded without any authority for such

exclusion under the ACC Constitution, ACC presidents and chancellors voted on November 28, 2012, to admit the University of Louisville, which will join the Conference in 2014.

11. The ACC derives substantial revenue through its business dealings, including advertising, promotion, merchandising, marketing, broadcasting, and events conducted, within the State of Maryland. Among other things, the ACC sponsors, hosts, and generates income from athletic events held in Prince George's County. Each of the member institutions in the ACC has athletic teams that compete in events in Maryland.

JURISDICTION AND VENUE

12. The Circuit Court for Prince George's County has general and specific personal jurisdiction over the parties to this action and venue is appropriate because the parties have systematic and continuous contacts in this jurisdiction and a substantial part of the acts and omissions giving rise to the causes of action pleaded in this Complaint occurred in this jurisdiction.

13. On November 26, 2012, the ACC filed an action against Maryland and the Board of Regents in Guilford County, North Carolina (the "North Carolina Action"). In the North Carolina Action, the ACC seeks a declaration that the Withdrawal Penalty is a valid and enforceable obligation of Maryland.

14. On January 18, 2013, the Board of Regents and Maryland filed a motion to dismiss the North Carolina Action for lack of personal jurisdiction. The Board of Regents and Maryland have not waived their sovereign immunity and are not subject to suit in the courts of the State of North Carolina. No discovery or other substantive proceedings have occurred in the North Carolina Action. The pendency of the North Carolina Action presents no impediment to

the prosecution of this action or to an award of the injunctive, declaratory, and monetary relief that the Board of Regents and Maryland demand here.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

The Competitive Landscape for Universities and Athletic Conferences

15. Maryland, like many universities across the United States, offers intercollegiate athletic activities for its student-athletes. Unlike professional sports leagues, universities have primary and significant functions that are not related to the athletic activity; these functions include academics, research and public service. This distinction between professional sports and academic institutions has been recognized by the United States Supreme Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

16. Universities compete with each other in many ways. Most obviously, universities compete for students. They also compete with one another for faculty and faculty resources, research opportunities and grants, presidents, chancellors and other high-ranking university administrators, alumni giving, fundraising and endowments. Universities also compete in athletics. They compete not only for victories in athletic contests, but with respect to recruitment of student-athletes, employment of coaches, athletic directors and other athletic department personnel, sales of tickets, broadcasting rights, school merchandise, and other promotional and advertising rights. In this sense, universities, including each of the members of the ACC, are horizontal competitors. An agreement among these universities not to compete, for example, with respect to the recruitment of faculty members or students or not to offer scholarships to certain groups of students would be an illegal restraint of trade.

17. Certain rules of play must be established in order to conduct sporting events between athletic teams from various universities. The rules of intercollegiate athletic competitions are typically set by the National Collegiate Athletic Association ("NCAA"). The NCAA is an association in which Maryland, the other ACC institutions, and numerous other colleges and universities in the United States are members. It promulgates rules on such topics as size of court or field, number of players on a team, rules for scoring and penalties, number of years a student-athlete is eligible to compete, permissible forms of recruiting, limits on athletic scholarship terms, and numerous other aspects of college sports. The NCAA also distinguishes between athletic programs as Division I, Division II, and Division III and sets specific conditions applicable to institutions depending on the Division in which they fall. This action is not a challenge to any NCAA rule or regulation or to its standards for Division membership.

18. In addition to the overarching NCAA association among universities offering intercollegiate athletic programs, almost all NCAA universities have also associated to form athletic conferences for at least one sport. Members of an athletic conference typically share the same NCAA designation (*i.e.*, Division I, II, or III). The ACC is such an association; it is a Division I conference consisting of the universities identified in Paragraph 9.

19. A collegiate athletic conference such as the ACC is a form of joint venture. The member universities associate in order to provide certain joint services necessary for the success of the particular athletic conference, but a conference does not require the membership or cooperation of all NCAA institutions. Such joint services include logistical and operational matters, such as scheduling games or matches and hiring and assigning referees. They typically also include significant revenue-generating activities such as selling broadcasting rights for

conference events, hosting a conference tournament and engaging in other joint promotional activities that increase the public recognition of the conference's member institutions.

20. Conference play requires the athletic teams (including teams for non-revenue-generating sports) of the member universities to travel to compete at athletic events at the sites of other member universities. As a result, conferences typically draw their members from a geographic area within which each member's teams can travel economically and without undue interruption of the student-athletes' academic responsibilities. In addition to geographical proximity, conferences or divisions within athletic conferences often include universities that offer historic and/or regional rivalries that are of great interest to the alumni and fan base of the respective institutions (*e.g.*, Duke vs. North Carolina, Ohio State vs. Michigan).

21. As an association, a conference such as the ACC acts as an instrument of, and pursuant to the instructions of, its members – members who, as described above, compete with each other with respect to students, faculty, academics, fundraising, and other matters. Despite their status as direct competitors both on and off the field, a conference's member universities may need to decide certain matters jointly, such as how to share the revenues from a conference tournament, what share of ticket receipts are given to the visiting team, whether to accept a proposed conference broadcasting contract, or what to pay conference administrators. While these activities may be legitimately undertaken by the members of a conference/association in order to promote the joint venture's success, the conference (acting through its members, or only some of them) may not take actions or adopt restrictions that unreasonably restrain trade and unreasonably restrict competition among universities or among different conferences.

Competition Among Conferences and Realignment

22. Competition is not limited to members of the same conference, who compete both on and off the field. Each conference, as a joint venture of the university members, competes in many ways with other conferences (typically joint ventures among a separate and distinct set of other universities). Conferences (or associations of member schools) compete for member schools, sales of tickets, sale of broadcasting rights, advertising and sponsorships, and opportunities for their members to compete in lucrative athletic contests, such as the Bowl Championship Series in football and the NCAA men's and women's basketball tournaments.

23. There exists a market in which intercollegiate athletic conferences compete for member institutions. Conferences often leverage broadcasting revenues to enhance the attractiveness of their athletic associations to prospective members. Various conferences have recruited and added member institutions to create or maintain appealing rivalries and enhanced competition, in order to increase fan interest, broadcasting ratings, and sponsorship appeal, with the goals of improving the product offerings of the conference, increasing revenues to the conference and its members, and enhancing its members' reputations and brands.

24. Changes in the alignment of colleges and universities within athletic conferences have occurred with increased frequency in recent years. Within 2012 alone, major revisions in membership occurred or were announced not only with respect to the ACC, but also in other collegiate athletic conferences.

25. The rapid conference realignment that has occurred in recent years (and that is likely to continue, absent unreasonable restraints on competition) has enabled institutions of higher learning to enhance the academic, athletic, and research opportunities available to their

students, student-athletes, and faculty through both increased revenues and enhanced visibility and reputational benefits.

26. Conference realignment is a method by which an academic institution can enhance its reputation and brand and its ability to attract student-athletes, students, faculty, and coaches. Realignment also presents an opportunity for universities to join conferences with universities with common attributes and missions.

27. Conference realignment creates conferences that are more appealing to intercollegiate athletics fans, which results in greater competition and greater benefits to consumers from the products offered by those conferences. Realignment of conferences creates the opportunity to attract to conference athletic events fans and consumers who are otherwise not following intercollegiate athletics.

28. Both historically and recently, the ACC has been an active participant in the market to recruit universities to become athletic conference members by aggressively pursuing and adding members. The ACC was founded in 1953 by seven universities that all left the Southern Conference. Shortly thereafter, the University of Virginia also withdrew from the Southern Conference to join the ACC. In 1971, the University of South Carolina withdrew from the ACC and later joined the Southeastern Conference. Thereafter, Georgia Tech, once part of the Southeastern Conference and a charter member of the Southern Intercollegiate Athletic Association, joined the ACC. In 1991, the ACC extended membership to Florida State, a charter member of the Dixie Conference and former member of the Metropolitan Collegiate Athletic Conference.

29. The ACC's membership remained the same until approximately 2004, when the ACC initiated the most recent trend of conference realignment. That year, the University of

Miami and Virginia Tech left the Big East Conference to join the ACC. One year later, Boston College followed.

30. Recently, the ACC has been extremely active in the market for new conference members. In 2012, Syracuse University and the University of Pittsburgh announced that they will withdraw from the Big East Conference and join the ACC in 2013. On September 12, 2012, the ACC announced that the University of Notre Dame will join the conference by 2015 for all conference-sponsored sports except football (although Notre Dame has agreed to play five ACC football teams each season). Most recently, on November 28, 2012, ACC presidents and chancellors voted to admit the University of Louisville (in a meeting from which Maryland was improperly and illegally excluded). Louisville is scheduled to leave the Big East and become an ACC member in 2014.

31. Pursuant to Section IV-3(g) of the ACC Constitution, each of these new members has been required to pay a fee to the ACC in order to join the conference. On information and belief, the ACC has imposed an entry fee of approximately $2 million with respect to the institutions that agreed to join the ACC in 2012.

32. Upon information and belief, the ACC continues to consider and solicit other institutions to join the Conference.

Maryland Is a Highly Attractive Candidate in the Market for Conference Membership

33. Several factors make Maryland an attractive candidate to intercollegiate athletic conferences that are seeking new members. Foremost among these is its long-standing tradition of athletic success and academic excellence.

34. With respect to athletics, Maryland teams have won national championships in football, men's basketball, women's basketball, men's lacrosse (10), field hockey (8), women's

lacrosse (11), men's soccer (3), and acrobatics and tumbling (4). Maryland is one of only three NCAA members to have won national championships in men's basketball, women's basketball, and football. In 2011-2012, 19 of Maryland's varsity teams earned trips to post-season competition. More than 40 Maryland student-athletes have participated in the Olympics. Since 2009, Maryland has increased its overall student-athlete Graduation Success Rate ("GSR") each year. Maryland's 83% GSR in 2012 was its highest ever and above the national average.

35. Maryland's history of academic and research excellence is equally impressive. Maryland boasts four Nobel Prize winners since 1997 and is known for its advanced research and educational expertise. Maryland's faculty features five Pulitzer Prize-winning faculty members and more than 40 members of the U.S. National Academies. Maryland has 30 academic programs ranked among the U.S. News Top 10 and 71 academic programs in the U.S. News Top 25. Maryland is first among top public universities with respect to the graduation of African Americans and ranks 37th among global universities, 28th among U.S. universities and 12th among U.S. public universities. Maryland's close proximity to Washington, D.C. and the nation's largest concentration of federal research facilities, has made it a leading partner on cutting-edge, high impact issues such as climate change, advanced language skills, food safety, and nutrition.

36. Maryland's location also makes it a highly desirable candidate for conference membership. Combined, the Washington, D.C. and Baltimore markets represent the fourth largest television broadcasting market in the United States.

37. As a prominent Division I university with a rich athletic history, including athletic teams that have competed for and won national championships in multiple sports, Maryland's interests require that its athletic teams compete in a highly-competitive conference whose

members are highly-competitive in a wide variety of sports. Athletic success against highly-competitive (and thus popular, well-known, and highly-visible) opponents maximizes Maryland's ability to recruit student-athletes, coaches and other athletic personnel, to generate fan and alumni interest, to generate ticket, broadcast, merchandise, and sponsorship revenue, and to enhance the university's name-recognition and reputation. Additionally, the competitive strength of Maryland's opponents is an important factor in several key ranking indices for intercollegiate athletics, including football and basketball rankings. As a result, certain less-competitive conferences would not be attractive to Maryland and would not present viable options.

38. At the same time, the cost and academic disruption of lengthy travel for student-athletes limits the number of conferences that present a realistic option for Maryland. Schools evaluate the benefits and costs when deciding the conference they wish to join.

The Athletic, Academic, and Financial Benefits Motivating Maryland's Decision to Join the Big Ten Conference

39. Dedicated to its statutory mission, Maryland is consistently driven to expand and heighten the level of the academic, educational, and research opportunities available to its students and faculty, all the while serving as a good steward of, and making the most economical use of, the resources provided by the State and its taxpayers.

40. In November 2012, the President of Maryland concluded that Maryland's mission would be best served, and the interests of its students, student-athletes, faculty, alumni, and Maryland taxpayers would be best served, by joining the Big Ten Conference. To that end, on November 19, 2012, the Board of Regents endorsed the decision of Maryland to join the Big Ten Conference in 2014.

41. While many factors influenced this important decision, three stand out. First, the Big Ten Conference is highly competitive in numerous sports and can provide Maryland superior competitive opportunities, visibility, and reputational benefits that are superior to those available from the ACC. Second, membership in the Big Ten Conference brings with it academic and research resources that are vastly superior in comparison to the ACC and that will enrich the experience of Maryland's students and faculty and help fulfill the University's core academic mission. Third, membership in the Big Ten Conference will provide Maryland with superior economic benefits and permit it to stabilize initially, and ultimately enhance, the overall competitiveness and breadth of its athletic offerings.

42. Participation in the Big Ten Conference will enhance the competitive opportunities available to Maryland's athletic teams. During the 2011-2012 season alone, the Big Ten claimed seven team national championships. Among other things, as a member of the Big Ten, Maryland will have the opportunity to engage in conference play with the storied Big Ten football and basketball programs. Enhanced competition on the field will likewise enhance Maryland's ability to compete off the field for the best student-athletes, coaches, and athletic department personnel, as well as for fan and alumni loyalty and support.

43. Membership in the Big Ten Conference, and the enhanced competitive opportunities that it will provide to Maryland, will increase Maryland's national visibility and reputation in the field of intercollegiate athletics and beyond. For example, Maryland's entry into the Big Ten will restore a geographic rivalry with Penn State, a historic athletic powerhouse. Becoming a part of the Big Ten will also expand Maryland's presence, visibility, and reputation beyond the mid-Atlantic region.

44. Maryland's presence and reputation will be further enhanced as a result of the Big Ten Network ("BTN"), the first national television network owned by an intercollegiate athletic conference. The BTN reaches 51 million homes in the United States and Canada through agreements with more than 300 cable, satellite, and telecommunications providers, and is available internationally in 20 countries. The BTN broadcasts a wide array of athletic competitions including, in addition to football and basketball, wrestling, baseball, women's softball, men's and women's soccer, ice hockey, track, swimming, lacrosse, golf, cross country, gymnastics, volleyball, as well as special programming and conference-wide meets. Beyond the BTN, the Big Ten's broadcast and media agreements with various networks (such as ABC and ESPN) provide the conference with broad national media exposure in multiple sports. Indeed, upon information and belief, the Big Ten Conference's broadcasting contracts generate more revenue than those of any other conference in the United States.

45. Upon information and belief, as a result of these and other factors, Maryland's move to the Big Ten Conference will result in a greater total output of NCAA athletic-related products, including but not limited to broadcasts, sponsorships, ticket sales, school and conference merchandise, and number of student-athletes than would occur if Maryland were to remain a member of the ACC. Upon information and belief, the move will lead to an increase in the number of student-athletes and teams competing for Maryland in intercollegiate athletics over and above the number if Maryland were to remain in the ACC.

46. Membership in the Big Ten Conference brings with it academic and research resources that are vastly superior in comparison to the ACC and that will enrich the experience of Maryland's students and faculty and help fulfill the University's core academic mission. For example, Big Ten universities outpace the members of any other conference by providing more

than $136 million in direct financial aid to nearly 10,000 student-athletes. Further, the Big Ten has the highest number of ranked graduate school programs among all conferences. Its thirty top-25 programs in the fields of law, medicine (research and primary care), business, engineering, and education place the Big Ten first among all conferences.

47. Furthermore, membership in the Big Ten Conference brings with it membership in the CIC, a premier consortium of outstanding institutions consisting of the Big Ten universities and the University of Chicago. Membership in the CIC will significantly enrich academic, research and collaborative opportunities for Maryland's students and faculty, enhancing Maryland's ability to compete for, attract and retain exceptional students and faculty. Membership in the ACC does not afford its members anything comparable to the CIC. Additionally, as a part of the Big Ten and CIC, Maryland will be able to utilize the collective purchasing power of the member schools, resulting in lower costs for items such as academic journals and laboratory equipment.

48. Membership in the Big Ten Conference will provide Maryland with superior economic benefits and permit it to initially stabilize, and ultimately enhance, the overall competitiveness and breadth of its athletic offerings, providing long-term financial security and sustainability to Maryland's athletic programs. Maryland's intercollegiate athletic programs are self-sustaining, meaning that they must generate their own operating revenues. In recent years, Maryland has operated its athletic programs at a deficit. As a result, Maryland spends significantly less per student-athlete than every other ACC member. Indeed, severe budget shortfalls forced Maryland to eliminate seven teams in 2012 (men's cross country, men's indoor track, men's swimming and diving, men's tennis, women's acrobatics and tumbling, women's

swimming and diving, and women's water polo) in order to balance its budget and attempt to remain competitive in the remaining sports.

49. By moving to the Big Ten, Maryland will significantly increase the revenue generated by its athletics department, enhancing Maryland's ability to compete on the field and permitting Maryland to sustain and ultimately enhance the athletic opportunities available to its student-athletes. Upon information and belief, the Big Ten pays annual distributions to its member schools well in excess of the revenue distributions made by the ACC to its members. On information and belief, this trend will continue and the gap between revenue distributions to Big Ten members and ACC members will widen in the coming years.

The ACC's Attempts to Punish Maryland and Deter Others

50. The ACC, acting as a joint venture of universities that compete with Maryland, is attempting to deny Maryland these significant athletic, academic and financial benefits by preventing Maryland from leaving the Conference or, alternatively, to impede and to penalize Maryland for its decision to join the Big Ten Conference in order to deter other institutions from withdrawing from the ACC. The ACC is attempting to do this by imposing the Withdrawal Penalty, despite the fact that it is void and unenforceable under the ACC Constitution; by withholding Maryland's share of conference revenues (and announcing its intention to withhold all future revenues due Maryland until the Withdrawal Penalty is paid in full), even though Maryland had not yet formally withdrawn from the ACC; and by denying Maryland (and its athletic teams) equal treatment and access with respect to ACC meetings, proceedings and decision-making. These actions are anticompetitive and unreasonable restraints on trade, violate the ACC Constitution and threaten irreparable injury to Maryland and its students, faculty, alumni, fans and other consumers.

The ACC Constitution

51. The ACC purports to operate under a Constitution and Bylaws, pursuant to which Conference members have agreed to conduct the ACC's business affairs. True and correct copies of the most recent Constitution and Bylaws made available to Plaintiffs are attached to this Complaint as Exhibits 1 and 2 and incorporated herein by reference.

52. The ACC Constitution states: "It is the purpose and function of this Conference to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, to enhance athletic and academic integrity among its members, to provide leadership and to do this in a spirit of fairness to all." Among the stated aims of the Conference set forth in the ACC Constitution are to "[e]ncourage responsible fiscal management and further fiscal stability," "[p]rovide leadership and a voice in the development of public attitudes toward intercollegiate sports," and "[p]romote mutual trust and friendly intercollegiate athletic relations between member institutions."

The ACC's Adoption of the Withdrawal Penalty in Violation of the ACC Constitution

53. While simultaneously recruiting new members, the ACC, acting as a joint venture, has attempted to prevent its existing institutions from leaving the Conference. On or about September 11, 2012, in a vote of its Council of Presidents conducted in violation of the ACC Constitution, a number of the member universities of the ACC purported to amend Section IV-5 of the ACC Constitution and approve the Withdrawal Penalty, which would impose on any member that withdraws from the Conference a penalty in an amount equal to three times the Conference's total operating budget. Upon information and belief, the ACC proposed that Section IV-5 be amended to read: "Upon official notice of withdrawal, the member will be subject to a withdrawal payment, as liquidated damages, in an amount equal to three times the

total operating budget of the Conference (including any contingency included therein), approved in accordance with Section V-1 of the Conference Bylaws, which is in effect as of the date of the official notice of withdrawal. The Conference may offset the amount of such payment against any distributions otherwise due such member for any Conference year. Any remaining amount due shall be paid by the withdrawing member within 30 days after the effective date of the withdrawal."

54. At present, the Withdrawal Penalty equals $52,266,342.00. Upon information and belief, the $52,266,342.00 Withdrawal Penalty would constitute the largest payment ever made by any member institution to leave any athletic conference. In contrast, the Big Ten, the Pac-12 and the SEC assess no exit fee on withdrawing members. Even for those conferences that require withdrawal payments, the ACC's excessive Withdrawal Penalty would be multiple times larger than that of any other intercollegiate athletic conference.

55. The ACC's members, acting as a joint venture of competing universities, approved the amendment and the Withdrawal Penalty over the objection of Maryland and one other member and in violation of the requirements set forth in the ACC Constitution for amending the ACC Constitution.

56. Specifically, Section X-1 of the ACC Constitution requires that any proposed amendment "be submitted, in writing, four weeks before the meeting, through the commissioner to the Constitution and Bylaws Committee for review."

57. Section X-1 further requires that the ACC commissioner "send complete copies of the proposed amendments to all members at least fifteen (15) days before the meeting" at which such amendments will be considered.

58. Neither the ACC commissioner nor the ACC complied with the requirements of Section X-1 of the ACC Constitution with respect to the purported amendment of Section IV-5 and approval of the Withdrawal Penalty. Nonetheless, the ACC's members (other than Maryland and one other member) voted to adopt the proposed amendment and approve the Withdrawal Penalty.

59. Maryland, through its President, Wallace D. Loh, opposed and voted against the amendment to Section IV-5 and the Withdrawal Penalty. Maryland has not assented to the purported amendment or the Withdrawal Penalty.

60. As a result of the ACC's failure to adhere to the requirements of Section X-1 of the ACC Constitution, the purported amendment of Section IV-5 and the Withdrawal Penalty are null, void and without effect. Nonetheless, the ACC has taken action to enforce the Withdrawal Penalty against Maryland, including, as described below, withholding Maryland's distributions of conference revenues.

The Withdrawal Penalty Lacks Any Economic Basis or Justification

61. The purported amendment to Section V-1 of the ACC Constitution characterized the Withdrawal Penalty as "liquidated damages." In fact, the Withdrawal Penalty of three times the Conference's total operating budget bears no justifiable relationship to the amount of damages, if any, which the ACC would incur upon Maryland's withdrawal from the Conference and has no economic basis or justification.

62. The lack of any economic basis or justification for the Withdrawal Penalty is demonstrated by, among other things, the fact that:

a. At no time before the September 11, 2012 vote, did the ACC (or the ACC commissioner) provide to its members any calculation or estimate of damages the

Conference would incur as a result of the withdrawal of a single member from the Conference.

b. Maryland has never received from the ACC or any other ACC member any calculation or estimate of the damages the Conference would incur from the withdrawal of a single member from the Conference.

c. Upon information and belief, no ACC member has received from the ACC any calculation or estimate of the damages the Conference would incur from the withdrawal of a single member from the Conference.

d. At no time before the September 11, 2012 vote, did the ACC (or the ACC commissioner) provide to its members any explanation or analysis with respect to the need to adopt the proposed amendment to Section V-1 and impose the Withdrawal Penalty in an amount equal to three times the Conference's total operating budget.

e. At no time before the September 11, 2012 vote did any member of the ACC provide to Maryland an explanation or analysis with respect to the need to adopt the proposed amendment to Section V-1 and impose the Withdrawal Penalty in an amount equal to three times the Conference's total operating budget.

f. The only rationale for the Withdrawal Penalty ever expressed in Maryland's presence was a statement made by the athletic director of another ACC member at a meeting of ACC athletic directors that the Withdrawal Penalty was needed to stop members from leaving the Conference.

63. The ACC will not suffer damages (if it suffers any damages at all) in an amount remotely approaching the amount of the Withdrawal Penalty. In fact, the $52,266,347.00

Withdrawal Penalty amounts to more than three times the 2013 projected annual distribution of conference revenues to each ACC member.

64. The $52,266,342.00 Withdrawal Penalty exceeds the entire budget for all of Maryland's intercollegiate athletic programs for the 2013 fiscal year.

The ACC's Illegal Application of the Amendment and Withholding of Distributions

65. Even if the September 11, 2012 amendment establishing the Withdrawal Penalty had been validly enacted (and it was not), the ACC has violated the ACC Constitution and acted tortiously and in an anticompetitive manner by attempting to enforce the amendment and the Withdrawal Penalty before they could become effective under the ACC Constitution and by withholding Maryland's distributions of conference revenues at a time when Maryland remains a member of the ACC and before Maryland has provided official notice of its intent to withdraw under the ACC Constitution.

66. Section X-2 of the ACC Constitution provides that "[a]ny amendments to the Constitution and Bylaws are effective July 1 following enactment, unless provided otherwise."

67. On information and belief, the purported amendment to Section V-1 of the Constitution presented for vote at the September 11, 2012 meeting did not expressly provide for an effective date different than that set forth in the ACC Constitution. As a result, neither the amendment nor the Withdrawal Penalty can become effective until July 1, 2013.

68. Notwithstanding the clear language of the ACC Constitution, the ACC has applied the amendment and attempted to enforce the Withdrawal Penalty by withholding more than $3 million in distributions owed to Maryland in December, 2012 and asserting its intent to withhold all future distributions from Maryland until the Withdrawal Penalty has been paid in full.

69. Moreover, under the ACC Constitution, the timing of a member's withdrawal from the Conference is determined by the date when the member provides "official notice of withdrawal." Section IV-5 of the ACC Constitution prescribes the only method for voluntary withdrawal from the ACC: "to withdraw from the conference a member must file an official notice of withdrawal with each of the conference members and the commissioner on or before August 15 for the withdrawal to be effective June 30 of the following year." Only at that point does the withdrawing institution become subject to a withdrawal payment under the ACC Constitution, and only at that point does the ACC Constitution permit the Conference to "offset the amount of such payment against any distributions otherwise due such member for any Conference year."

70. In short, under the ACC Constitution, the withdrawing member is not subject to a withdrawal penalty and may not have its distributions of conference revenue withheld in order to satisfy a withdrawal penalty until that member provides "an official notice of withdrawal," and the withdrawing member remains, in all other respects, a member of the ACC, entitled to all rights and privileges of a member, until its actual withdrawal date.

71. Maryland has not filed an official notice of withdrawal. Although Maryland has announced its intention to join the Big Ten Conference in 2014, a public announcement does not constitute the official notice under Section IV-5 of the ACC Constitution. Maryland has not yet determined when it will provide official notice of its intent to withdraw from the ACC.

72. Except for certain specifically defined revenues (not at issue here), the ACC Constitution and Bylaws provide for the equal distribution of ACC revenues to its members. None of the exceptions to this rule of equal distribution permits the ACC to withhold a member's

share of conference revenues simply because that university's leadership determined that it is in the best interest of that member to join a different conference in the future.

73. Nonetheless, the ACC wrongfully withheld from Maryland and retained Maryland's share of the conference revenues distributed in December 2012. Maryland's share was $3,067,255.27. The ACC acknowledged this improper action, and stated its intent to withhold from Maryland and retain all future distributions, in a letter dated December 14, 2012. This action by the ACC breached the ACC Constitution and was retaliatory, tortious and anticompetitive.

74. When the ACC wrongfully withheld the December 2012 payment due to Maryland, the Conference was aware that Maryland had a policy that required the university to fund its intercollegiate athletic programs from revenues generated by the intercollegiate athletic department. The ACC also knew that Maryland had budgeted the receipt of ACC distributions in its athletic department budget. The ACC further knew that Maryland's athletic department depends on the ACC revenues to meet its expenses and fund its intercollegiate athletic programs, including the payment of coaches' salaries, travel expenses for teams and athletic scholarships for its student-athletes.

75. By withholding revenue distributions from Maryland, the ACC (and the members of the ACC who supported the Withdrawal Penalty) have endeavored to make Maryland's athletic teams less competitive within the Conference. As a member of the ACC, Maryland's teams are obligated by the ACC Constitution to field teams in scheduled athletic competitions to compete against their ACC counterparts. The other ACC members enjoy the full benefits of ACC membership including receipt of substantial distributions that are now being withheld from

Maryland. The ACC has tilted the playing field and has injured and will continue to injure Maryland and its student-athletes.

76. The refusal of the ACC to distribute the revenue due and owing to Maryland as an ACC member institution means that the university's intercollegiate athletics department will be forced to operate in a deficit in 2013. No other appropriated sources of revenue stand available to Maryland's intercollegiate athletics department to make up for the deficit caused by the ACC's refusal to distribute to Maryland its share of conference revenues in December, 2012 or subsequently.

77. Cuts to planned athletic expenditures would be to the detriment of student-athletes and the overall competitiveness and reputation of Maryland's intercollegiate athletics program. Such reductions in expenditures could affect not only Maryland's short term on-field competiveness, but also its ability to maintain its athletic facilities at a level needed to compete most effectively for Division-I student-athletes.

78. The ACC and each of the other members of the ACC are aware that significant budget cuts in intercollegiate athletic programs can put into jeopardy the competitiveness of teams. Universities that have experienced the elimination of a Division-I sport for even a single season have experienced the difficulty of regaining a highly competitive team. The ACC and each of its members also know that significantly weakening Maryland's athletic programs will undermine Maryland's ability to compete with other ACC members for student-athletes, coaches, sponsorship opportunities and other financial and reputational benefits that Maryland derives from its intercollegiate athletics programs.

The ACC's Unequal and Disparate Treatment of Maryland

79. The ACC has not only discriminated against Maryland financially to penalize Maryland for the public announcement of its intention to join the Big Ten Conference in 2014; the ACC has also denied Maryland certain rights and privileges to which Maryland is entitled as a member of the ACC and to which it will remain entitled until it actually withdraws from the ACC.

80. Although Maryland's investigation is continuing, Maryland is aware that the ACC, on behalf of the members that supported passage of the Withdrawal Penalty, has excluded Maryland official designates from Conference meetings held in November and December 2012 and excluded Maryland coaches and athletic staff from meetings dealing with ACC athletic competitions.

81. On December 13, 2012, Maryland sought assurances from the ACC that the Conference will treat Maryland as a full member, including by paying the university all regular distributions of fiscal year 2013 Conference revenue, projected by the ACC to total approximately $16 million. Defendant ACC has failed and refused to provide these assurances. Rather, the ACC announced to all ACC member institutions its intent to pay all members *except* Maryland the revenue distributions due to be paid in equal amount to all members of the Conference.

82. In addition, Maryland President Wallace D. Loh has not been notified of or asked to participate in ACC Presidents' activities and decisions. Dr. Loh was neither notified of, nor participated in a vote of the Conference Presidents on the decision to admit a new ACC member institution, the University of Louisville, on or about November 28, 2012.

83. Nothing in the ACC's Constitution permits the Conference to discriminate in its treatment of member institutions. Maryland has not filed an official notice of withdrawal with the Commissioner and remains a member of the ACC entitled to all rights, privileges, duties and obligations owed by the ACC to its members.

84. By discriminating against Maryland and not permitting Maryland to be a full and equal member of the ACC, the ACC intends to tilt the playing field further and render Maryland's athletic teams less competitive with respect to the teams of those members who do enjoy all of the rights and privileges of ACC membership.

Adoption and Application of the Withdrawal Penalty Constitutes Anticompetitive Joint Action of the ACC's Members

85. The adoption of the Withdrawal Penalty and the imposition of that penalty to attempt to cripple the competitiveness of Maryland's athletic teams represent the joint action of the ACC members who voted in favor of that policy and authorized the action. This joint action by the member institutions of the ACC is a horizontal agreement among competitors that unreasonably restrains trade. As noted above, Maryland neither voted in favor of nor supported the Withdrawal Penalty adopted by other ACC members. Moreover, the Withdrawal Penalty was not adopted in accordance with the ACC Constitution. Neither the adoption of the Withdrawal Penalty fee nor the ACC's method of extracting the Withdrawal Penalty falls within any semblance of a policy or conduct required for the success of any legitimate ACC joint venture activities. The ACC's extraction of the Withdrawal Penalty while Maryland remains a member of the ACC is not reasonably ancillary to any legitimate joint conduct by the ACC and its association members. Indeed, the ACC's imposition of the Withdrawal Penalty at the same time that the ACC requires an entry fee of only $2 million demonstrates that the ACC fears competition; that the ACC wants to prevent other conferences from competing for and offering

pro-competitive opportunities to the ACC's current members; and that the ACC wants to deter current ACC members from considering moving to another conference that might – with the addition – present an even stronger conference offering in comparison to the ACC and that might appeal to more fans, sponsors and broadcasters than are currently attracted to NCAA athletic events. There is no pro-competitive reason to justify the exit fee of this magnitude or the ACC's actions in cutting off Maryland from funds to which Maryland is entitled as a current ACC member.

86. The fact that the size of the Withdrawal Penalty approximates the total spending by Maryland on *all* of its athletic programs in 2013 demonstrates, on its face, the anticompetitive intent and the implausibility of any purported legitimate reason for certain members of the ACC to adopt the Withdrawal Penalty and limit the options of universities such as Maryland to compete.

87. The fact that the Withdrawal Penalty is three times the 2013 projected distribution to an ACC member institution demonstrates, on its face, the anticompetitive intent of ACC members and the intent to weaken Maryland as a competitor – both on the field and in competition for student-athletes, coaches and sponsorship opportunities – while benefitting the remaining ACC members.

88. The magnitude of the Withdrawal Penalty, a penalty adopted by competing universities who might otherwise compete to seek more appealing, more economically efficient and more pro-competitive memberships in other conferences, reflects an agreement among those competitors to adopt a penalty so great that, as a practical matter, it prevents existing members of the ACC from pursuing affiliations that could lead to increased quality and quantity of intercollegiate athletics.

89. Adopting a fee of this magnitude and refusing to pay Maryland its regular distributions of Conference revenue before Maryland has even provided official notice of its intent to withdraw from the ACC further evidences that the ACC and the members who supported the Withdrawal Penalty are not acting in an economically rational manner for a group purporting to support the competitiveness of a conference.

90. By withholding revenue rightfully owing to Maryland and imposing the Withdrawal Penalty, the ACC is adopting a course of action to render Maryland's athletic teams less competitive within the Conference. Members of a conference have an interest in having each member of the conference be a strong competitor that will enable the conference events to have greater entertainment appeal and attraction due to the uncertain outcome of an athletic event. Furthermore, with strength of schedule now a factor in the consideration for teams receiving invitations to the NCAA basketball tournament and to BCS football rankings, action by a conference and some its members that intentionally weakens the athletic programs of another conference member makes no economic sense. Instead, the conduct undertaken by the ACC is consistent with an effort to suppress and limit competition among conferences and teams as universities such as Maryland consider whether another conference may best serve the students, faculty, alumni and research activities of the university. The adoption of the draconian Withdrawal Penalty and the attempt to eliminate a principal source of the funding for Maryland's athletic programs are more consistent with a desire by the ACC (and those ACC members who supported the Withdrawal Penalty and the withholding of payments owed Maryland) to send a warning to any other members of the ACC that might be considering leaving the ACC because they are unhappy with the leadership or direction of the conference or because they believe that

another conference offers better opportunities and advantages for the institution, students, student-athletes and fans.

COUNT I
(Declaratory Judgment)

91. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 90, as if fully set forth herein.

92. The September 11, 2012 amendments to Section IV-5 purporting to approve the Withdrawal Penalty are null, void, invalid and unenforceable, because they were adopted in contravention of the ACC Constitution. Upon information and belief, the proposed amendment to Section IV-5 was not submitted, in writing, four weeks before the September 11, 2012 meeting, through the ACC commissioner to the Constitution and Bylaws Committee for review. Additionally, complete copies of the proposed amendment were not sent to Maryland or, upon information and belief, to all other ACC members at least 15 days before that meeting.

93. The Withdrawal Penalty is not enforceable as liquidated damages. To the contrary, the Withdrawal Penalty is illegal, unenforceable and void as a penalty. The ACC has never made any credible effort to estimate what, if any, reasonable damages the Conference would incur as the result of any single member's withdrawal. Rather, its arbitrary and capricious Withdrawal Penalty stands solely as a penalty and punitive measure aimed at discouraging and preventing members from withdrawing from the ACC, and was established for that very purpose. Upon information and belief, no institution of higher education that has withdrawn from one athletic conference to join another has ever paid an exit fee remotely approaching $52,266,342.00 to do so. As a result, the Withdrawal Penalty is not valid liquidated damages provision but rather is an illegal and unenforceable penalty.

94. The amendment and the Withdrawal Penalty could not be effective under the ACC Constitution before July 1, 2013.

95. An actual controversy of a justiciable issue exists between the parties. The ACC contends that the amendments to Section IV-5 purportedly adopted by the Conference on September 11, 2012 are valid and enforceable and that the Withdrawal Penalty is enforceable as liquidated damages. In addition to the public statements to that effect, the ACC has withheld monies properly due and owing to Maryland, purportedly in satisfaction of the Withdrawal Penalty. This genuine controversy between Plaintiffs and the ACC involving the rights and liabilities of the parties under the ACC Constitution lies within this Court's jurisdiction, and the controversy may be determined by a judgment of this Court.

WHEREFORE, Plaintiffs respectfully request:

a. That this Court determine the rights and liabilities of the parties with respect to the subject ACC Constitution;

b. That this Court find and declare that the Withdrawal Penalty set forth in Section IV-5 of the ACC Constitution is invalid and unenforceable;

c. That this Court find and declare that Section IV-5 of the ACC Constitution was not properly amended and, therefore, is invalid;

d. That this Court find and declare that, even if properly adopted, Section IV-5 of the ACC Constitution would apply only to ACC members that provide official notice of withdrawal from the conference on or after July 1, 2013;

e. That this Court find and declare that Maryland is entitled to and should receive its share of all distributions of Conference revenues, including, but not limited to, the payment of $3,067,255.27 that the ACC withheld in December, 2012;

f. That the ACC be enjoined from denying Maryland all of its rights as an ACC member; and

g. That Plaintiffs be granted costs and such other and further relief as this Court may deem just and proper.

COUNT II
(Breach of Contract)

96. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 95 above, as if fully set forth herein.

97. The ACC Constitution constitutes a contract to which Maryland, the ACC and the remaining members of the ACC are parties.

98. The ACC has breached its obligations to Maryland under the ACC Constitution by, among other things, withholding and retaining Maryland's share of conference revenue in the amount of $3,067,255.27, denying Maryland, its student-athletes, coaches and athletic staff equal access and treatment as a member of the ACC, and improperly purporting to adopt an amendment to Section IV-5 regarding the withdrawal of member institutions on September 11, 2012, and purporting to apply and enforce that amendment and the Withdrawal Penalty before its effective date under the ACC Constitution.

99. Maryland has performed and satisfied its obligations under the ACC Constitution (and any ancillary agreements). Any and all conditions precedent to the performance and enforcement of the ACC's obligations to Maryland under the ACC Constitution have been satisfied or waived.

100. As a result of the ACC's breaches, the purported amendment to Section IV-5 of the Constitution purportedly adopted by the Conference on September 11, 2012, is *void ab initio*.

101. As a direct and proximate result of the ACC's breaches, Maryland has been damaged.

WHEREFORE, Plaintiffs respectfully request:

a. That this Court enter judgment in favor of Plaintiffs in the amount of all compensatory damages, which are not less than $3,067,255.27, plus interest;

b. That the ACC be enjoined from denying Maryland all of its rights as an ACC member; and

c. That Plaintiffs be granted costs and such other and further relief as this Court may deem just and proper.

COUNT III
(Violation of the Maryland Antitrust Act, Md. Code Ann., Comm. Law § 11-204)

102. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 101, as if fully set forth herein.

103. The actions by the ACC, as an association of the various other member institutions that compete with Maryland, have had an anticompetitive effect and distorted competition in a number of relevant antitrust markets.

104. As described above, by exacting the Withdrawal Penalty and refusing to pay Maryland amounts owed Maryland, the ACC's actions adversely affect competition in the markets in which conferences compete for university members and in which universities compete for membership in conferences. In addition, the ACC's conduct also adversely affects relevant markets for providing educational services and athletic competitions for student-athletes and for providing athletic events for consumers of intercollegiate sporting events. Further, the ACC's conduct reduces competition in the relevant market for coaches of intercollegiate sports.

The ACC's conduct distorts the market and adversely affects competition in each of these markets.

105. From the perspective of a prospective Division I conference member such as Maryland, geographic and competitive considerations limit the number of conferences that fall within the relevant market. In the context of realistic conference opportunities for Maryland, the ACC has market power.

106. The ACC's adoption and implementation of an excessive, unreasonable, and punitive Withdrawal Penalty constitutes an agreement, combination or conspiracy among the ACC and the members voting in favor of the draconian fee that unreasonably restrains trade. The ACC's Withdrawal Penalty and withholding of funds owed to Maryland reflect a horizontal agreement among the member universities of the ACC, with the ACC policing and enforcing the anticompetitive restraint. The establishment of this exorbitant penalty goes well above and beyond what is necessary to compensate the ACC for the loss of any member or the amount needed to continue the Conference's operations. The measure is solely punitive and was approved by the ACC and its members with the sole anticompetitive intent to prevent institutions from leaving the Conference.

107. The ACC's Withdrawal Penalty will have an anticompetitive effect and will unreasonably restrain trade in relevant antitrust markets (including the markets for conferences seeking member universities and universities seeking to affiliate with conferences) and will result in a chilling effect on the ability of intercollegiate athletic conferences to build teams and promote their member institutions. But for the ACC's actions, the relevant markets would be competitive. The purpose and intent of the Withdrawal Penalty is to prevent schools from leaving the Conference, thereby restricting schools from improving their performance on the

field and in all of the relevant markets. The ACC and its members know that by denying Maryland funds it is due as an ACC member and by imposing the Withdrawal Penalty, they will be eliminating a significant portion of the revenues that Maryland uses for its athletic teams that compete with the teams of those ACC member universities. The ACC and its members also know that the effect of their conduct will be to benefit the other ACC members while significantly weakening Maryland as a competitor – both on the field and in recruiting student-athletes and coaches. This conduct by the ACC and its members, effected by an agreement of horizontal competitors, unreasonably restrains competition in the relevant markets by distorting the markets and interfering with the most efficient allocation of athletic program outputs. A weakening of Maryland athletics or a reduction in the quality of Maryland teams as a result of the ACC's Withdrawal Penalty and withholding of funds due to Maryland will harm consumers who are fans of Maryland athletic teams in the Washington-Baltimore area and will also harm consumers of the Big Ten Network by reducing the quality of play and popularity of televised sporting events involving Maryland.

108. The ACC's adoption of the Withdrawal Penalty and attempt to enforce the Withdrawal Penalty and cut off ACC membership benefits owed to Maryland are per se illegal under the Maryland Antitrust Act and/or illegal under a "quick look" in that the restrictions reflect an agreement among competitors to impose a restriction on another competitor that is not reasonably ancillary to the legitimate purposes of the ACC joint venture. The anticompetitive effects of the Withdrawal Penalty are obvious and the ACC can provide no pro-competitive justification sufficient to defend the exorbitant fee. In the alternative, the joint action in adopting the Withdrawal Penalty and seeking to impose it against Maryland is illegal under the Rule of Reason. The fact that the ACC has market power over existing members of the ACC is

demonstrated by its ability to use or threaten to use the Withdrawal Penalty to prevent universities from leaving the ACC or to significantly weaken member institutions that opt to leave the ACC and join another conference.

109. Under the Maryland Antitrust Act, any member of an illegal conspiracy is jointly and severally liable for three times all damages incurred as a result of the illegal conduct. Each of the members of the ACC is a competitor of Maryland in a number of ways, including as to the recruitment of faculty, student-athletes, non-athlete students, research grants and as to the sale of sponsorship and advertising and ticket sales. The adoption of the Withdrawal Penalty that would wipe out nearly the entire intercollegiate athletic budget of Maryland by a vote of competitors of Maryland, to be enforced by the ACC, is illegal under the Maryland Antitrust Act. The ACC, as a participant in that conspiracy, is jointly and severally liable for the entire amount of damages (trebled) plus attorneys' fees. An injunction against the ACC would have the effect of stopping the illegal conduct.

110. As discussed above, as a result of the ACC's anticompetitive actions, consumers are harmed by deterioration in the quality of goods and services; by not receiving the most efficient, desirable, and effective intercollegiate leagues, conferences, and competitions; and by any increases in price or other fees needed to offset the financial penalty imposed by the ACC. In addition, Maryland has incurred and will incur substantial damage and injury from any resulting curtailment of its intercollegiate athletic programs and its ability to compete and participate in various markets.

111. Under § 11-209(b)(4) of the Commercial Law Article of the Annotated Code of Maryland, Plaintiffs are entitled to treble damages as a result of the actions of Defendant ACC.

112. Section 11-209(b)(3) requires that the Plaintiffs be awarded costs and reasonable attorney's fees if an injunction is issued.

WHEREFORE, Plaintiffs respectfully request that this Court:

a. Enter judgment in favor of Plaintiffs and award damages $156,799,026.00, constituting a multiple of three times the amount of compensatory damages;

b. Permanently enjoin Defendant ACC from engaging in the unreasonable restraint of trade in violation of the Maryland Antitrust Act and, specifically, enjoin the ACC from withholding funds owing to Plaintiffs and from otherwise harming Maryland; and

c. Award the Plaintiffs costs, reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper.

COUNT IV
(Tortious Interference with Prospective Advantage)

113. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 112, as if fully set forth herein.

114. The ACC's attempt to amend the ACC Constitution and adopt the Withdrawal Penalty, actions to enforce the Withdrawal Penalty by withholding distributions of Maryland's share of Conference revenues, and denying Maryland equal access and treatment as a member of the ACC constitute intentional, deliberate and willful acts calculated to cause damage to Maryland in the conduct of its lawful affairs and business.

115. The actions of the ACC are intentional, willful, and calculated to cause damage to Maryland's lawful business affairs, including its ability to conduct its athletic affairs on level financial and competitive playing fields. The ACC's conduct was perpetrated with the intentional and improper purpose of causing damage and was without justifiable cause.

116. As a result of the ACC's tortious and wrongful misconduct, Maryland has suffered and will continue to suffer damages.

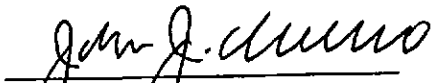
WHEREFORE, Plaintiffs respectfully request:

a. That this Court enter judgment in favor of Plaintiffs for their compensatory damages in an amount to be proven at trial, and punitive damages, plus interest; and

b. That Plaintiffs be granted costs and such other and further relief as this Court may deem just and proper.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland



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DEMAND FOR JURY TRIAL

Plaintiffs, the Board of Regents and Maryland, respectfully request a trial by jury as to all matters for which a right of trial by jury is available.

John J. Kuchno

EXHIBIT 1

ATLANTIC COAST CONFERENCE

CONSTITUTION

[Note: For your convenience, any changes in the 2012-13 ACC Constitution have been underlined.]

Article I. NAME

The name of this association shall be the Atlantic Coast Conference, hereinafter referred to as the Conference.

Article II. PURPOSE

Section II-1. General Purpose.

It is the purpose and function of this Conference to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, to enhance athletic and academic integrity among its members, to provide leadership and to do this in a spirit of fairness to all. The Conference aims to:

a. Enhance the academic and athletic achievement of student-athletes;
b. Increase educational opportunities for young people;
c. Foster quality competitive opportunities for student-athletes in a broad spectrum of amateur sports and championships;
d. Promote amateurism in intercollegiate athletics;
e. Coordinate and foster compliance with Conference and NCAA rules;
f. Stimulate fair play and sportsmanship;
g. Encourage responsible fiscal management and further fiscal stability;
h. Provide leadership and a voice in the development of public attitudes toward intercollegiate sports;
i. Address the future needs of athletics in a spirit of cooperation and mutual benefit of the member institutions; and
j. Promote mutual trust and friendly intercollegiate athletic relations between member institutions.

Section II-2. Principle of Equity.

The Conference and its member institutions assert the value of intercollegiate athletics to all individuals. The Conference and its member institutions are committed to providing equitable opportunities as required by law for participation in competition, administration and governance in a spirit of fairness for all. Structure, programs, legislation, services and policies of the Conference and its member institutions shall affirm those principles.

Article III. INSTITUTIONAL CONTROL

There shall be institutional responsibility and control of intercollegiate athletics at member institutions. Each institution is responsible for conducting its intercollegiate athletics program in compliance with rules and regulations of the NCAA and the Conference. The institution's chief executive officer is ultimately responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditures.

The institution's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution.

Article IV. MEMBERSHIP

Section IV-1. Current Membership.

The Conference is composed of the following institutions:

Boston College
Clemson University
Duke University
Florida State University
Georgia Institute of Technology
University of Maryland
University of Miami
University of North Carolina
North Carolina State University
University of Virginia
Virginia Polytechnic Institute & State University
Wake Forest University

Exhibit 1

Section IV-2. Required Teams.

Each member institution shall have a men's and women's basketball team, a football team, and either a women's soccer team or a women's volleyball team.

Section IV-3. Admission of New Members.

a. Prior to considering admission of new members, the Council of Presidents shall consider the desirability of expansion. The ramifications of conference revenues, scheduling, student-athlete welfare and the pool of prospective members may be considerations among other issues. A favorable vote of three–fourths of the total members of the Council of Presidents is required on the willingness of the Council to consider expansion before the conference can proceed to consider any candidate institutions.

b. New members must be proposed for admission by three members of the Council of Presidents, one of which must be from the prospective member's state, if applicable.

c. Upon proper nomination for admission as outlined in (b), an expression of interest for admission by the prospective member institution with requested data shall be received by the Conference office. The data will be distributed to the chief executive officers, faculty representatives and athletics directors of all conference members.

d. The prospective member shall submit to the Conference additional information regarding the institution's academic and athletic cultures. Information shall include, but is not limited to the most recent report of the accrediting agency for colleges and universities, the Equity in Athletics Disclosure Act (EADA) report, and the NCAA Committee on Athletics Certification report.

e. A favorable vote of three-fourths of the total members of the Council of Presidents is required to extend an invitation for membership to the Conference.

f. Participation by the new member in Conference revenues will be determined at the time of admission.

g. Upon the admission to the Conference, a new member shall pay a fee to the Conference of at least an amount covering payment for a proportionate share of the ownership of all real and personal properties held in the name of the Conference.

Section IV-4. Expulsion/Suspension/Probation of Members.

A member institution may be expelled, suspended or placed on probation by the Conference only upon the favorable vote of three-fourths (excluding the member under consideration) of the members. To expel means a complete severance from the Conference in all sports. To suspend means a temporary severance under stated conditions from the Conference in one (1) or more sports.

Among the reasons a member institution may be expelled, suspended or placed on probation for good cause is if it no longer participates in one or more sports which are required for membership in the Conference or if the member is required by the NCAA to discontinue such required sport because of violations of NCAA regulations or becomes incompatible with the objectives of the Conference.

In the event of expulsion, the Conference must provide the member institution with the specific reasons for expulsion and one year notice (on or before August 15 of any year in which event the expulsion shall be effective the following June 30). The institution will be assessed or paid a proportionate share of the fixed liabilities or assets of the Conference and will receive a proportionate share of that year's distribution.

In the event of suspension or probation, the Conference may enforce penalties immediately.

In any sport in which a member is ineligible for postseason play because of violations of NCAA or Conference regulations, the member may be suspended in that sport. If suspended, the member shall not be eligible for the Conference championship in that sport. The institution may be required to forfeit its share of any or all Conference revenues generated by that sport.

Section IV-5. Withdrawal of Members.

To withdraw from the conference a member must file an official notice of withdrawal with each of the conference members and the commissioner on or before August 15 for the withdrawal to be effective June 30 of the following year.

Upon official notice of withdrawal, the member will be subject to a withdrawal payment, as liquidated damages, in an amount equal to one and one-quarter (1¼) times the total operating budget of the Conference (including any contingency included therein), approved in accordance with Section V-1 of the Conference Bylaws, which is in effect as of the date of the official notice of withdrawal. The Conference may offset the amount of such payment against any distributions otherwise due such member for any Conference year. Any remaining amount due shall be paid by the withdrawing member within 30 days after the effective date of withdrawal. The withdrawing member shall have no claim on the assets, accounts or income of the Conference. *(Revised: September 2011)*

Article V. VOTING DELEGATES

The members of this Conference shall be entitled to one vote each. The voting delegate shall be the representative of the member institution, appointed by the president, or by the duly constituted authority of the institution, and shall be a regular full-time member of the faculty at the time of appointment or an administrative officer in that institution. The voting delegate shall be one whose primary duty is not in athletics. *(Revised: May 2008)*

Article VI. OFFICERS

Section VI-1. Officers.

The officers of the Conference shall be a president, a vice-president and a secretary-treasurer. The above officers must be voting delegates of their institutions.

The president shall be the official representative of the Conference in all relations concerning intercollegiate athletics and, in cooperation with the Commissioner, shall foster compliance with all NCAA and Conference rules and regulations. The president shall preside at all meetings of the Conference, shall appoint standing and special committees after consulting with the chair of the Athletics Directors Committee and the Commissioner, and shall be an ex-officio member of all committees of the Conference. The president shall assure that proper notices of Conference meetings be given to the members and that an agenda be prepared for each meeting. The president shall have such other powers and duties as are normal and incident to such office (see General Policies & Procedures, Article X, regarding the President's Award). *(Revised: April 2008)*

The vice-president shall perform the duties of the president, until the next election, in the latter's absence or disability, or when the presidency is vacated.

The vice-president shall assist the president in the performance of Conference business when necessary and shall have other powers and duties as may be conferred by the president or by the Conference.

The secretary-treasurer shall have supervisory responsibility of all records of the Conference, shall review the records of all meetings of the Executive Committee, shall report at each regular meeting the decisions of the Executive Committee rendered since the last regular meeting, and shall submit at the annual meeting a detailed statement of all receipts and disbursements of Conference funds. All accounts are to be audited by a certified public accountant.

Section VI-2. Election of Officers.

Officers of the Conference shall be elected at the meeting in May and shall continue in office from July 1 through June 30. Candidates for office must have served a minimum of two (2) years as a voting delegate to be eligible for an office.

Officers shall be elected according to a rotation determined by constituent members and on file in the Conference office. Generally, each year, the current vice-president becomes the new president and the current secretary-treasurer becomes the new vice-president. A new secretary-treasurer is nominated and elected based on who is next in line for the position according to the Conference rotation.

If the president's position becomes vacant during the middle of a term of office, the vice-president shall assume the presidency of the Conference. If deemed necessary by the president, other vacant offices occurring between the meetings of the Conference shall be filled by the Executive Committee.

The Executive Committee shall approve any needed adjustments to the rotation cycle. A new member to the Conference shall be added to the end of the rotation cycle. *(Revised: May 2006)*

Article VII. COUNCIL OF PRESIDENTS

The Council of Presidents shall be composed of the chief executive officer from each member institution and shall have the complete responsibility for and authority over the Atlantic Coast Conference. The Commissioner shall serve on the Council as an ex-officio, non-voting member.

The chair of the Council shall rotate among the voting membership on an annual basis and shall be chosen from an institution other than those already represented on the Executive Committee.

The Council shall meet once in the fall (the second Tuesday and Wednesday in September) and once during the Men's or Women's Basketball Conference Championship, alternating annually. The meeting during the Championship shall also include the faculty athletics representatives, athletics directors and senior woman administrators.

Article VIII. EXECUTIVE COMMITTEE

The Executive Committee shall be composed of the president, the vice-president, the secretary-treasurer, the immediate past president, and the chair of the Council of Presidents. In the event the immediate past president ceases to be a representative of the Conference, a member-at-large shall be chosen by the Conference to serve on the Executive Committee. The Commissioner and the chair of the Athletic Directors shall serve as ex-officio members without vote.

The Executive Committee shall transact the necessary business of the Conference between regular meetings of the Conference, subject to approval of the voting delegates at the next regular or special meeting. The Executive Committee is also charged with overseeing the management and operation of the Conference in accordance with its Constitution and Bylaws.

A member institution may appeal to the Conference any decision or action of the Executive Committee.

The Executive Committee may establish changes in the procedures for the general conduct of the Commissioner's office.

The Executive Committee shall meet at least two (2) weeks prior to the May meeting to review the budget prepared by the Commissioner and recommend a budget for the forthcoming year to the membership for approval at the May meeting. The Executive Committee shall conduct a mid-year budgetary review.

Article IX. COMMISSIONER

There shall be a Commissioner who shall be elected by a vote of three-fourths of the Council of Presidents at any regular or special meeting. The Commissioner shall serve as the chief administrative officer of the Conference and shall be responsible to the Executive Committee. The Commissioner shall ensure adherence to the principles of the Constitution and Bylaws by all members of the Conference.

The Commissioner shall perform such duties as are prescribed in the Bylaws and such other duties as may be prescribed by the Executive Committee. The Commissioner shall have the powers necessary for the effective performance of the Commissioner's duties.

Article X. AMENDMENT

Section X-1. Amendment Procedures.

This Constitution may be amended at any regular or special meeting by three-fourths of the members. The proposed amendment shall be submitted, in writing, four weeks before the meeting, through the commissioner to the Constitution and Bylaws Committee for review. The Commissioner shall send complete copies of the proposed amendments to all members at least fifteen (15) days before the meeting.

Section X-2. Effective Date.

Any amendments to the Constitution and Bylaws are effective July 1 following enactment, unless provided otherwise.

EXHIBIT 2

ATLANTIC COAST CONFERENCE

BYLAWS

[Note: For your convenience, any changes in the 2012-13 ACC Bylaws have been underlined.]

Article I. SPORTSMANSHIP PRINCIPLE

It shall be the responsibility of each member institution to insure that all individuals associated with the athletics program of that institution conduct themselves in a sportsmanlike manner when representing their university. Unsportsmanlike conduct, when demonstrated by any party associated with a member institution, will not be tolerated and may subject the individual to disciplinary action. The member institution with which the individual is associated may also be subject to disciplinary action if it is found that the institution's actions, or failure to act, substantially contributed to the individual's misconduct. The duties with regard to sportsmanship of member institutions, the Commissioner, coaches, student-athletes, band members, cheerleaders, mascots and officials are elaborated in the Sportsmanlike Policy in the Sports Operation Code.

Public criticism of officials or comments evaluating the officiating of particular contests is not in the best interest of intercollegiate athletics. Institutional personnel are prohibited, therefore, from commenting on officiating, other than directly to the Conference office. (See Article I in the Sports Operation Code for the Sportsmanlike Policy.)

Article II. NCAA REGULATIONS

The Conference and each of its member institutions shall be members of Division I Football Bowl Subdivision of the NCAA. Member institutions are bound by NCAA rules and regulations, unless Conference rules are more restrictive.

Article III. OFFICE OF THE COMMISSIONER

Section III-1. Duties of the Commissioner.

The Commissioner's duties shall include:

a. CHIEF ADMINISTRATIVE OFFICER. Serve as the chief administrative officer of the Conference.

b. CONFERENCE RULES AND REGULATIONS. Interpret and enforce all rules and regulations of the Conference and of the NCAA. This responsibility includes, but is not necessarily limited to, broad discretionary powers to supervise investigations, hold hearings and impose temporary or permanent measures against member institutions, personnel, and student-athletes for conduct judged to be in violation of the spirit as well as the letter of Conference Constitution and Bylaws. The above shall be carried out under procedures as set forth in the Conference Bylaws.

c. EQUITY. Implement and advocate the principle of equity.

d. COMMITTEE MEMBERSHIP. Serve as an ex-officio, nonvoting member of the faculty athletics representative's, Executive and athletics director's committees, Council of Presidents and all other Conference committees.

e. MEETINGS. Issue the call for regular and special meetings of the faculty athletics representatives, athletics directors and the Executive Committee. Make arrangements for the meetings of these groups, and for such meetings of the coaches or other employees of the athletics administration as may be authorized by the athletics directors, and be responsible for the publication and distribution of all minutes setting forth actions by any of these groups.

f. CONSTITUTION AND BYLAWS. Reprint the Constitution and Bylaws from time to time as may be necessary, and distribute copies as appropriate to each member institution's chief executive officer, faculty athletics representative, athletics director and senior woman administrator.

g. ATHLETICS PROBLEMS. Study athletics problems of the Conference, offer advice and assistance in their solution, and encourage and promote friendly relations among the member institutions, student-athletes and alumni.

h. OFFICIATING. Assign football and basketball officials for all games between member institutions. Assignments also may be made for non-conference football and basketball games and for other sports when requested. The Commissioner is authorized to expend funds from his budget for the improvement of officiating.

Exhibit 2

i. AWARDS AND TROPHIES. Purchase awards and trophies presented by the Conference.

j. PUBLICITY. Conduct, through the print and electronic media, periodicals, various meetings and the general service of the Conference office, a continuing educational program to promote the development of better sportsmanship, respect for the amateur spirit, and understanding of the values of competitive athletics, and exert all reasonable effort to acquaint the public with the ethics and high ideals which motivate the Conference in its conduct of intercollegiate athletics.

k. INCOME PRODUCING PROJECTS. Initiate and formulate, for the Conference, income producing projects.

l. SCHOOL VISITS. Visit each Conference school at least once each year to inquire into and observe the operation of its intercollegiate athletics program.

m. ASSISTANCE TO NON-MEMBERS. Stand ready to render assistance to non-member institutions when solicited.

n. CONFERENCE EMPLOYEES. Select and engage assistants and employees to assist in carrying out the above described activities; to choose titles for conference employees; and to fix their compensation within the limits of the approved budgets.

o. EXECUTE CONTRACTS. Unless otherwise provided in the Bylaws, the Commissioner has the power to execute contracts.

p. CONFERENCE BUDGET. Present a budget for consideration to the Executive Committee at least two weeks prior to the May meeting of the Conference. This budget requires Conference approval.

q. OTHER DUTIES. Perform such other duties as the Council of Presidents, faculty athletics representatives, the athletics directors or the Executive Committee may direct or as required in Articles VIII and IX in this section.

Section III-2. Commissioner's Contract.

The Commissioner shall be paid a salary to be determined by the Conference. The term of the contract, including fringe benefits, shall be recommended by the Executive Committee and approved by two-thirds of the members of the Council of Presidents.

Section III-3. Office of the Commissioner.

The Office of the Commissioner shall be located at a place designated by the Conference.

Article IV. GOVERNANCE

Section IV-1. Organization.

Each member institution will have one representative with voting power in each of the following governance groups: *(Adopted: May 2009)*

a. Council of Presidents
b. Faculty Athletics Representatives
c. Directors of Athletics
d. Senior Woman Administrators

Section IV-2. Structure.

The Council of Presidents shall have the complete responsibility for and authority over the Conference. The Executive Committee shall transact the necessary business of the Conference between regular meetings of the Conference, subject to approval of the voting delegates at the next regular or special meeting, as well as oversee the management and operation of the Conference in accordance with its Constitution and Bylaws. The faculty athletics representatives, as voting delegates,

per Article V of the Constitution, shall take final action on conference matters only during joint business sessions. See the governance structure detailed in Appendix I of this section. *(Adopted: May 2009)*

Section IV-3. Conference Meeting Dates and Sites.

The faculty athletics representatives, athletics directors and senior woman administrators shall hold the annual Conference business meeting in May. Business meetings are also held in October and December. *(Revised: May 2009)*

a. COUNCIL OF PRESIDENTS. The Council shall meet once in the fall and once during the Men's or Women's Conference Basketball Championship, alternating annually. The meeting during the Championship shall also include the faculty athletics representatives, athletics directors and senior woman administrators.

b. REGULAR MEETINGS. All of the governance groups shall meet three times each year in October, April and May. Each group shall meet separately before convening in a joint business session.

c. FALL MEETINGS. This regular annual meeting of the faculty athletics representatives, athletics directors and senior woman administrators shall be held in October at the institution of the current conference president.

d. LEGISLATIVE MEETING. Annually the faculty athletics representatives and senior woman administrators shall meet jointly in December, at the site of the ACC Football Championship Game, to discuss and formulate conference positions on proposed NCAA legislation.

e. WINTER MEETINGS. Annually the faculty athletics representatives and the athletics directors shall meet separately and jointly in January/February.

f. APRIL MEETINGS. This regular annual meeting of the faculty athletics representatives, athletics directors and senior woman administrators shall be in April and shall coincide with the ACC Post-Graduate Scholar-Athlete Banquet.

g. SPRING MEETINGS. This regular annual meeting of the faculty athletics representatives, athletics directors and senior woman administrators shall be held in May.

h. ADDITIONAL MEETINGS. Additional meetings may be called by the president or Commissioner as deemed necessary or pursuant to written request of not less than two-thirds of the members. In either case, the call shall state the reasons for the meeting. The site of the meeting will be determined by a vote of the Conference. Conference business may also be conducted by teleconference when authorized by the president or Commissioner.

Section IV-4. Quorum.

To constitute a quorum for the transaction of business at a meeting of the Conference, two-thirds of the member institutions must be represented by voting delegates.

Article V. FINANCES

Section V-1. Conference Budget.

The Finance Committee, comprised of one representative from each member institution, shall participate with the Conference office staff and Commissioner in preparing the annual operating budget for the forthcoming year. Once this budget process is complete, the Committee will request that the Commissioner forward the final draft budget to the Executive Committee and all twelve (12) institutions for review at least two (2) weeks prior to the May meeting of the Conference. The Executive Committee will recommend the final budget for approval at that meeting. The Conference budget shall include a ten (10) percent contingency amount. *(Editorial Revision: 2008)*

Section V-2. Distribution of General Revenue.

The Conference shall distribute its revenue, including but not limited to revenue from television receipts, Conference championships, participation in preseason or postseason competition, and interest from Conference funds on deposit, according to the provisions set forth in this Article.

Before distributing the revenue to each institution, the Conference shall deduct the funds reserved for the budget for the following year, including the ten percent contingency amount. Unless otherwise specified in this Article, the remainder of the Conference revenue shall be divided equally among the Conference members and distributed in shares to each member by June 1, or the first business day following June 1, in accordance with the distribution plan approved annually by the Executive Committee.

Any distributable funds not received in the Conference office by June 1 will be distributed equally upon receipt.

If income sources do not provide necessary funds for the operation of the Conference office, an assessment shall be levied upon the member institutions in equal amounts.

Section V-3. Conference Reserve.

The Conference shall maintain a reserve equaling one times the Conference approved annual operating budget. Any distribution of excess funds to the member schools shall be equal and calculated annually based on the Conference's annual audited financial statements as follows: *(Revised: October 2008)*

1. Total unrestricted net assets, net of property and equipment, less accumulated depreciation.
2. Less the reserve as defined above.

Section V-4. Postgraduate Scholarships.

The Conference shall add the money received from player of the game awards presented during televised Conference football and men's basketball games and other money as determined by the Executive Committee to the funds used for the Conference Postgraduate Scholarships.

The scholarships are awarded to student-athletes who have completed their undergraduate degrees and who plan to attend a graduate program within three (3) years.

Section V-5. Employee Insurance.

The Conference shall be insured against dishonesty and theft by the Commissioner and any Conference employee and the cost of the insurance shall be paid from Conference funds.

Section V-6. Indemnification and Liability.

The Conference shall indemnify the faculty athletics representatives, the chief executive officers, the athletics directors, the senior woman administrators, the Commissioner, and the Conference staff against all costs (including attorney's fees), expenses, judgments, fines, and other amounts reasonably incurred by any or all such persons, or any of them, in connection with any claim, demand, suit, or proceeding, civil or criminal, arising out of and related to the interpretation or enforcement of the Conference rules where the person to be indemnified acted in good faith and in a manner reasonably believed by such person to be in the best interest of the Conference and to be authorized by the rules of the Conference.

Section V-7. Distribution of Revenue from the NCAA Men's Basketball Championship.

All receipts from the NCAA Men's Basketball Championship (six-year performance history and broad base programs) will be divided equally among the member institutions after payments to the participating teams as outlined below.

A team participating in the first round of the Men's Basketball Championship will receive $40,000. A team participating in the second/third rounds will receive $40,000. Any team advancing beyond the third round and playing east of the Mississippi will receive an additional $45,000. Any team advancing beyond the third round and playing west of the Mississippi will recieve an additional $55,000. If a team advances to the Final Four, it will receive an additional $85,000 if playing east of the Mississippi and $95,000 if playing west of the Mississippi.

A team participating in the Women's Basketball Championship will receive $25,000. A team advancing to the Regional will receive an additional $25,000 (for a total of $50,000). If a team advances to the Final Four, it will receive an additional $50,000 (for a total of $100,000). Exception: if an ACC team hosts a first and second round site, and their team plays at that site, the institution would not receive the initial supplemental distribution. *(Adopted: October 2007, Editorial Revision: 2011)*

Section V-8. Distribution of Revenue from the National Invitational Tournaments.

A team participating in the preseason or the postseason National Invitational Tournaments shall keep all game receipts.

Section V-9. Distribution of Revenue from Postseason Football Games.

All receipts from postseason football games will be divided equally among the member institutions after payments to the participating teams. Expense allowances will be provided to all teams participating in a postseason bowl game. The base expense allowance for all Conference bowl games is $1.1 million. BCS bowl games' base expense allowances range from $1.7 million to $2.1 million depending on the bowl game. Amounts are then adjusted in increments of $25,000 depending on travel distance between the institution and the bowl game site. Actual expense allowances are described in Appendix II of this section. *(Revised: December 2005, May 2008, May 2010; NCAA Revision: 2008)*

Should a team participate in a game not specified in Appendix II, distribution and expenses will be determined at a meeting of the Conference. Conference schools who participate in post-season bowl games are responsible for the sale of the first 6,000 tickets. After 6,000 tickets, the Conference will share in the expense of unsold tickets (calculated at the lowest ticket price available) as follows:

a. From 6,001 through 7,000 tickets, the Conference will pay 50% of ticket cost.

b. From 7,001 through 8,000 tickets, the Conference will pay 75% of ticket cost.

c. From 8,001 through the contracted guaranteed amount of tickets at the respective bowl game, the Conference will pay 100% of ticket cost.

Any funds designated by the preseason or postseason game specifically for nonathletic scholarships will go directly to the participating institution and will not be included in the Conference revenue distribution.

Section V-10. Early Distribution of Football Television Receipts.

A member institution may elect a February distribution of football television receipts. The Commissioner shall poll the member institutions in September to determine whether they wish to receive an early distribution of the television receipts. This distribution will be made when the Conference office receives all of the funds due from the national networks. Institutions electing early distribution will not receive interest payment on the balance of funds left on deposit from national network receipts.

Section V-11. Payment of Expenses.

a. MEETINGS. Among the meetings for which the Conference will reimburse business-related expenses for institutional personnel are: *(Revised: May 2008, May 2010)*

1. Winter Conference Meetings (January/February): FAR (and adult guest), AD (and adult guest)
2. February SWA/Assistant/Associate AD Meeting: SWA, one selected Assistant/Associate AD
3. CEO Meeting (March Men's/Women's Basketball Tournament): CEO, FAR, AD, SWA
4. April Conference Meetings: AD, FAR, SWA
5. Annual Spring Conference Meetings (May/June): FAR (and adult guest), AD (and adult guest), SWA (and adult guest), head football coach (and adult guest), head men's basketball coach (and adult guest), head women's basketball coach (and adult guest)
6. Division IA FAR Spring Board Meeting: FAR representative to the Division IA FAR group

7. Fall CEO Meeting (September): CEO, FAR Chair, AD Chair
8. Fall Conference Meetings (October): FAR, AD, SWA, SAAC Member
9. FARA Meeting (November): Conference Secretary-Treasurer
10. Legislative Meeting (December Football Championship): FAR, SWA (and adult guest)
11. Other Meetings: For a called Conference meeting, the school designated attendee(s) only shall be reimbursed for business-related expenses.

All service groups, except compliance coordinators, will meet once per year and will be reimbursed for that meeting. Compliance coordinators will meet twice per year. One individual from each school will be reimbursed for all service groups meetings. Service groups include: academic advisors, compliance coordinators, development directors, facilities and operations directors, student-athlete development coordinators (life skills coordinators), marketing directors, ticket managers, sports information directors, athletic trainers, associate/assistant athletics directors and video services directors. *(Revised: May 2011)*

b. EVENTS. Among the events for which the Conference will reimburse business-related expenses for institutional personnel are: *(Revised: October 2008)*

1. ACC Football Championship: CEO (and adult guest) AD (and adult guest)
2. Conference Champion Bowl or participating school's bowl (three night allowance): CEO (and adult guest), FAR (and adult guest), AD (and adult guest), SWA (and adult guest)
3. Conference Champion Bowl only: Head football coaches (and adult guest)
4. ACC Men's Basketball Championship: CEO (and adult guest), FAR (and adult guest), AD (and adult guest), SWA (and adult guest)
5. ACC Women's Basketball Championship: CEO (and adult guest), FAR (and adult guest), AD (and adult guest), SWA (and adult guest)

The chair(s) and vice-chair(s) of the sports committees will be reimbursed for business-related expenses incurred while attending the Championship. Business-related expenses are defined as meals, lodging (single or double room rate) tips and gratuities, and transportation [coach airfare, taxi, car rental plus gas, personal auto (current IRS mileage allowance)].

Section V-12. Football Ticket Return Policy.

Two (2) weeks prior to the date of the game, the visiting institution should retain no more than 500 unsold tickets from the original ticket allotment sent by the home team. The remainder should be overnighted to the host institution at that time. Three (3) days prior to the game day, the visiting institution may return no more than 150 unsold tickets from the above-mentioned allotment, which should be overnighted to the host institution's ticket office for next morning delivery. Following the game, the visiting institution will be allowed to return up to 100 unsold tickets plus any unused band tickets.

The host school may modify the above policy to be less restrictive if circumstances allow.

Section V-13. Amendment Procedures.

Article V. (Finances) of this section may be amended at any regular or special meeting by two-thirds of all members. *(Adopted: April 2006)*

Article VI. RULES OF ELIGIBILITY APPLICABLE TO ALL SPORTS

Section VI-1. Conference Initial-Eligibility Rule

A nonqualifier whose first full-time collegiate enrollment occurs at an ACC institution shall not be eligible for competition, practice, or athletically related financial aid at any conference institution. On an annual basis, a conference member may permit a maximum of four nonqualifiers (two in men's sports and two in women's sports with no more than one in any single sport) who have been granted a partial waiver by the NCAA Initial Eligibility Waiver Committee permitting them to receive athletic aid and/or practice per NCAA rules and whose first full-time collegiate enrollment occurs at an ACC institution. *(Revised: February 2006)*

A nonqualifier who transfers to a conference institution from a two-year college must have graduated with an AA degree (or equivalent), satisfactorily completed a minimum of 48 semester or 72 quarter hours with a cumulative GPA of 2.0 on transferable degree credit acceptable toward any baccalaureate degree program at the certifying institution, and have attended the two-year college that awarded the AA degree (or equivalent) as a full-time student for at least three semesters or four quarters (excluding summer terms) in order to be eligible for competition, practice, and athletically related financial aid. *(Revised: October 2007, May 2008)*

A nonqualifier who transfers to a conference institution from a four-year college outside the ACC must, in addition to meeting all NCAA rules regarding such transfers, have satisfactorily completed 48 semester or 72 quarter hours with a cumulative GPA of 2.0 on transferable degree credit acceptable toward any baccalaureate degree program at the certifying institution, and have attended the immediately preceding four-year college as a full-time student for at least three semesters or four quarters (excluding summer terms) in order to be eligible for competition, practice, and athletically related financial aid. *(Revised: October 2007)*

A nonqualifier who transfers to a conference institution from a two-year college, subsequent to attending a four-year college outside the ACC, must meet all NCAA rules regarding 4-2-4 transfers.

Upon written application and good cause shown, the faculty representatives, acting as a committee of the whole, shall have the authority to grant exceptions to this rule based on objective evidence that demonstrates circumstances which warrant the waiver of the normal application of this rule (e.g., the student's overall academic record, whether the student was recruited by the institution). A written summary of the faculty athletics representatives' decision will be distributed to all Conference members and kept on file in the Conference office.

a. INTERNATIONAL TRANSFER EXCEPTION. An international transfer student-athlete who did not take a standardized test before enrolling full-time at an international collegiate institution shall be immediately eligible for financial aid, practice and competition, provided the student-athlete meets all NCAA four-year college transfer requirements and the student-athlete was not recruited by any institution prior to enrolling full-time at the international collegiate institution. The student must demonstrate foreign residency and attendance at the foreign institution. *(Adopted: May 2008; Editorial Revision: 2010)*

b. MALE PRACTICE PLAYER EXCEPTION. Male practice players are exempt from the conference initial-eligibility rule provided the student meets all NCAA eligibility requirements. *(Adopted: May 2008)*

Section VI-2. Intra-Conference Transfer Rule.

A student-athlete who transfers directly to an ACC institution from another ACC institution and who was recruited by the institution from which they are transferring, for whom the athletics department interceded in the admissions process, or who received any athletically related financial aid during the academic year immediately prior to the transfer is required to complete one (1) academic year (two full semesters or three full quarters) of residency at the certifying ACC institution before being eligible to compete for or to receive athletically related financial aid from the certifying institution. Such an academic year of residency shall count as one of the student-athlete's four (4) permissible seasons of competition permitted under NCAA legislation. During such a year of residency, the student-athlete is permitted to practice pursuant to NCAA eligibility rules regarding practice eligibility. A transfer student-athlete admitted after the twelfth day of class may not utilize that semester or quarter for the purpose of establishing residency. Waivers of this ACC rule may be considered by the ACC faculty athletics representatives, acting as a committee of the whole, provided the student-athlete has qualified for an exception or waiver of the NCAA four-year college transfer rule. Further, the waiver request must demonstrate objective evidence that proves the student-athlete's extraordinary personal hardship necessitates the transfer to another ACC institution. *(Revised: February 2006, October 2008)*

a. GRADUATION EXCEPTION. A student-athlete who receives a baccalaureate degree at one member institution and who has been admitted into a graduate degree program at another member institution may transfer to another member institution without being subject to the intra-conference transfer rule. NCAA transfer regulations would apply. *(Revised: February 2006)*

Section VI-3. Intra-Conference National Letter of Intent Rule.

An individual who signs a valid National Letter of Intent with an ACC institution and does not satisfy the one-year attendance requirement or the Junior College graduation provision of the National Letter of Intent may not represent

another ACC institution in intercollegiate athletics competition until the individual has completed one (1) full academic years of residence at the latter ACC institution and shall be charged with the loss of one (1) season of eligibility in all sports. An individual receiving a complete release per Item 5 of the National Letter of Intent may not represent another ACC institution in intercollegiate athletics competition until the individual has completed one full academic year at the latter ACC institution and shall be charged with the loss of one season of eligibility in all sports. Waivers of the ACC rule must demonstrate objective evidence that proves the student-athlete's extraordinary personal hardship necessitates the transfer to another ACC institution. These waivers may be considered by the ACC faculty athletics representatives, acting as a committee of the whole, only after all appeals to the National Letter of Intent Steering Committee and the National Letter of Intent Appeals Committee have been processed. *(Revised: April 2007, October 2008)*

Section VI-4. Medical Hardship Waivers.

The Office of the Commissioner has the authority to administer all requests for medical hardship waivers per NCAA legislation. Institutions should submit such waiver requests on a form prescribed by the Conference office. All waiver requests received by the Conference should be complete upon submission and contain all the necessary and required NCAA and Conference documentation.

a. APPEALS. An institution may appeal the decision of the Office of the Commissioner to the faculty athletics representatives. If an institution wishes to appeal, a written appeal must be received in the Conference office within 30 calendar days from the date of the original decision letter. The faculty athletics representative from the institution appealing the decision will present the appeal to the entire council of faculty athletics representatives for vote. The decision of the faculty athletics representatives will be final, subject only to an appeal to the NCAA.

Section VI-5. Conference Eligibility Waivers.

An approved waiver of the ACC initial eligibility rule, the intra-conference transfer rule, intra-conference national letter of intent rule and medical hardship waivers requires an affirmative vote of two-thirds of the member institutions. All members, including the institution requesting the waiver, are eligible to vote. *(Revised: October 2011)*

Section VI-6. Documentation of Summer Employment and Automobile Ownership.

Each member institution shall document annually information regarding various aspects of summer employment and automobile ownership or usage for all full grant-in-aid recipients. Specific information prescribed by the Conference office is required to be included on institutional forms. *(Revised: May 2008)*

Section VI-7. Eligibility.

a. ELIGIBILITY CERTIFICATION. It is the responsibility of each institution to certify its student-athletes in accordance with all applicable conference and NCAA eligibility requirements prior to allowing the student-athlete to represent the institution in intercollegiate competition.

b. FORFEITURE OF GAMES. When a player is found to be ineligible for intercollegiate athletics, all athletic contests in which the student-athlete has participated, after the date of the act or conditions which rendered the individual ineligible, may be forfeited to the respective opposing team or teams, and any individual championships may be forfeited.

Section VI-8. Exceptions.

Exceptions to the above rules of eligibility may be allowed in individual cases in which the circumstances are extremely unusual and in which the exception will be in accord with the spirit and intent of all rules and regulations concerning eligibility.

Article VII. ASSIGNING OFFICIALS

The Conference office shall be responsible for the assignment of officials in the following sports: baseball, men's and women's basketball, field hockey, football, men's and women's soccer, softball and volleyball. In no event shall officials be employees of the Conference.

Article VIII. ENFORCEMENT PROCEDURE

Section VIII-1. Alleged Violations.

The Commissioner may receive and investigate reports of alleged violations of rules and regulations of the Conference and of the NCAA and may interpret and rule upon such.

In order to prevent escalation of intra-conference problems and continuation of violations, the following procedures are required:

a. A member institution shall communicate to the conference office potential NCAA violations that might result in student-athlete ineligibility and generate media exposure. Further, an institution shall communicate potential violations of NCAA rules when it is reasonable to conclude that the potential violations might be major in nature (e.g., NCAA interview conducted). Such communication should be directed to the Commissioner (or his or her designee) in a timely manner and ultimately shall also include the resolution of the matter once complete.. *(Adopted April 2012)*

b. An inquiry or report of alleged violations by a Conference member should be sent from a senior level athletics administrator or compliance director from the institution making the allegation to a senior level athletics administrator or compliance director at the institution to which the allegation is made. In addition, the institution making the allegation should notify the Conference office. If the above option is followed, the institution making the allegation is considered party to any investigation and shall receive subsequent information as outlined in (c) below. An institution may also utilize the conference compliance staff to communicate allegations from one Conference member to another; however, in this instance, the institution is not considered party to any investigation and shall not receive subsequent information. In either case, all findings should be reported to the Commissioner.

c. The institution against which the allegation is made should consult with the Conference to procure advice and guidance in how to conduct the investigation, but should not rely upon the Conference to assist in the actual investigation.

d. Only the institution which made the allegation shall receive periodic progress reports throughout the investigation along with a final report at the conclusion of the investigation. That institution, shall not, however, release any information it receives to any other institution or entity. Violations of this will result in forfeiture of any subsequent information regarding the investigation or other sanctions.

e. Once the investigation has concluded, the institution shall report its findings and, if applicable, any action taken to the Conference and/or NCAA. Subsequent to any decision or determination by the Conference and/or NCAA, only the institution which made the allegation shall receive a final report that shall include the following:

1. Facts of the case as discovered through the investigation
2. Findings based upon the facts presented
3. Action and/or penalties taken

Section VIII-2. Investigations.

The Commissioner is the principal enforcement officer of the Conference Rules and Regulations but shall not undertake significant investigative responsibilities except in a supervisory capacity. Upon the request of the athletics director or faculty representative of any member institution showing reasonable grounds or upon the Commissioner's own initiative, the Commissioner shall initiate such investigation as may be necessary to determine whether there has been a violation. As part of such an investigation, the Conference office should assist the institution in:

a. Determining whether the potential violation will be viewed as secondary or major by the NCAA Enforcement Staff;

b. Identifying any mitigating circumstances;

c. Determining the appropriate institutional action that should be taken to remedy the situation;

d. Determining appropriate penalties that would likely be accepted by the Enforcement Staff, the NCAA Committee on Infractions, the NCAA Student-Athlete Reinstatement Staff, or the NCAA Student-Athlete Reinstatement Committee;

e. Processing secondary violations through correspondence to the Enforcement Staff;

f. Processing major violations through summary disposition, or Committee on Infractions; or

g. Processing any eligibility appeals through the NCAA-Student-Athlete Reinstatement Staff or the NCAA Student-Athlete Reinstatement Committee.

Section VIII-3. Hearings.

If the investigation reveals that a violation may exist, the Commissioner shall inform the president, the faculty athletics representative, and the athletics director of the member institution involved, and afford an opportunity to be heard.

The Commissioner may elect to hear those cases deemed to be secondary in nature. Such hearing may be conducted by an assistant commissioner designated by the Commissioner. If after a hearing or failure of an institution to appear for a hearing, the Commissioner concludes there is a violation, the Commissioner is empowered to impose penalties such as, but not limited to, those listed in Appendix I of the Committees section.

All other cases will be heard by the Executive Committee. That body shall have the same power as the Commissioner to impose penalties. No representative of the institution for whom the hearing is being held shall have membership on the hearing body. The institution and any employee or student-athlete involved in the case shall have an opportunity to be heard and to be represented by legal counsel. The decision of the hearing body must be rendered within one week after the hearing.

Section VIII-4. Unsportsmanlike Conduct.

The Commissioner is authorized to investigate cases involving unsportsmanlike conduct of coaches, institutional officials or participants on teams representing member institutions and, if sufficient evidence is found that they have been guilty of unsportsmanlike conduct, the Commissioner is authorized to impose such penalties as in his judgment the case warrants.

Section VIII-5. Penalties.

Penalties imposed by the Commissioner shall become effective immediately and shall remain in effect until and unless set aside by the Conference on appeal.

Section VIII-6. Enforcement Reports.

The Commissioner shall upon request, report to the Conference in executive session the results of any investigations into violations of Conference rules and regulations.

Article IX. APPEALS

Section IX-1. Appeal Procedures.

The decision of the Commissioner or the Executive Committee in any proceedings under Article VIII may be appealed. Such appeal must be made by the institution involved within fourteen (14) days after receiving, by registered mail, the notice of such action. Appeals from decisions about interpretations or violations of the Conference rules and regulations, or penalties imposed under these rules, shall be made to the Conference through the Conference president.

a. Final appeal of decision made by the commissioner normally is heard by the Executive Committee; however, at the request of the appealing institution, the Conference will hear the appeal in lieu of the Executive Committee.

b. Final appeal of a decision made by the Executive Committee normally is heard by an Appeals Committee consisting of the past-president of the Conference from the Executive Committee, those faculty athletics representatives who are not members of the Executive Committee, and two athletics directors appointed by the president in such manner that no member institution will have both its faculty athletics representative and athletics director serving on the Appeals Committee. At the request of the appealing institution, the Conference will hear the appeal in lieu of the Appeals Committee.

c. The committee hearing the appeal may, if it so chooses, modify the decision as to guilt and/or penalty but may not increase the penalty.

d. Appeals shall be limited in scope and will not constitute a newcomplete hearing of the case. Notice of appeal shall state specifically the findings of violations or penalties or both on which the appeal is being made and the reasons why these items are being appealed.

Section IX-2. Appellate Decision.

The decision as to the appeal shall be rendered only after affording any institution, employee, or student-athlete involved in the appealed portion of the case an opportunity to be heard and to be represented by legal counsel and must be rendered within one week after the hearing of the appeal. Such decision is final and is not subject to further appeal except under provision of Section IX-3 (New Evidence or Prejudicial Error).

Section IX-3. New Evidence or Prejudicial Error.

The Executive Committee shall consider a request to reopen a case upon receipt of new evidence of fact or of prejudicial error in the hearing or appeals procedure. A decision not to reopen a case is not subject to further appeal.

Article X. TELEVISION POLICY

Section X-1. Conference Package Contracts.

The Television Committee is authorized to negotiate the terms and conditions of contracts involving telecast of packages of football games and men's basketball games. Such contracts shall be submitted to the member institutions for approval, disapproval or suggestions and recommendations, consistent with the terms of Conference contract policy as described in Section X-3 (Conference Television Contract Policy).

Section X-2. Revenues From Sale of Rights to Package.

All revenues from sale of rights to the Conference television packages referred to in Section X-1 (Conference Package Contracts) shall be deposited with the Conference office.

Section X-3. Conference Television Contract Policy.

Negotiations for future television contracts shall be conducted by the Commissioner with input from a television subcommittee appointed by the Commissioner, in consultation with the President of the Conference. The subcommittee shall be comprised of representatives from faculty athletics representatives, athletics directors and senior woman administrators.

Discussions and recommendations from the television subcommittee will be reported out to the full television committee. The television committee will review the proposed terms and conditions of the agreement(s) and make their recommendations to the faculty athletics representatives for their consideration and approval by two-thirds vote of the members of the conference.

If practicable, television contracts should be in written form and signed by the participating parties within 60 days of the time of the agreement. If possible, said contract(s) shall be signed no later than 30 days prior to the first televised event of sports covered within this agreement. *(Adopted: May 1992, Revised: January 2010)*

Section X-4. Good Faith Effort not to Compete with Package.

The Conference members will make every good faith effort not to participate in a football or men's basketball game that will be televised in conflict with any of the Conference television packages of games. "Televised" and "television" mean over the air or by cable. If a Conference member is to participate in a nonpackage televised game which conflicts with or overlaps with one of the Conference football or men's basketball packages of games, the Conference member may participate

in such nonpackage televised game only if (a) such nonpackage game is not distributed on television in the Conference area (defined as Maryland, District of Columbia, Virginia, North and South Carolina, Georgia, and Florida), or (b) if the nonpackage game is to be televised in the Conference area; such game may be televised only during a time period which does not substantially overlap the time during which a Conference package game is being televised. When it appears there will be an overlap, the matter shall be promptly referred to the commissioner, who shall then consider all relevant factors and make a final determination, in his sole discretion as to whether or not the overlap is substantial.

Section X-5. Member Institution Contracts.

Individual member institutions may enter into contracts for the telecasts of football and men's basketball games which are not a part of the Conference packages, but only if such contracts do not conflict with Conference package contracts referred to in Section X-1 (Conference Package Contracts) and also comply with all other provisions of this Article.

Section X-6. Revenues From Non-Package Games.

The revenues derived from participation by any Conference member in any televised game outside the Conference television packages shall be deposited with the Conference office.

Section X-7. Conference Non-Package Contracts.

In appropriate circumstances, the Commissioner's office may negotiate television contracts for events that are not part of the Conference television package of games referred to in Section X-1 (Conference Package Contracts). However, such nonpackage contracts may, in the Commissioner's discretion, be negotiated by the Committee on Television and/or submitted to the member institutions for approval.

Section X-8. Rights Fee.

The Television Committee shall establish a rights fee for any football game or men's basketball game being televised which is not part of any of the Conference television packages of games.

Section X-9. Distribution of Revenues.

The revenues derived under Sections X-2 (Revenues From Sale of Rights to Package) and X-6 (Revenues From Non-Package Games) of this Article shall be divided equally among the Conference members.

Section X-10. Amendment Procedures.

Article X (Television Policy) of the Bylaws may be amended at any regular or special meeting by two-thirds of all members. *(Adopted: April 2006)*

Article XI. GENERAL REGULATIONS

Section XI-1. Booster Organization.

The athletics director shall serve as a board member of the institution's athletics booster (fundraising) organization where one exists, and the employees of that organization shall be directly responsible to the athletics director or the person to whom the athletics director reports.

Section XI-2. Annual Institutional Certification.

A member institution shall not be eligible to enter a team or individual competitors in a Conference championship unless its governing board makes an annual institutional certification, on a form approved by the Conference office, attesting that:

a. Responsibility for the administration of the athletics program has been delegated to the chief executive officer of the institution.

b. The chief executive officer has the mandate and support of the board to operate a program of integrity in full compliance with NCAA, Conference and all other relevant rules and regulations.

c. The chief executive officer, in consultation with the faculty athletics representative and the athletics director, determines how the institutional vote shall be cast on issues of athletics policy presented to the NCAA and the Conference.

Section XI-3. Nonprofit Operating Principles.

a. INUREMENT OF INCOME. No part of the net earnings of the organization shall inure to the benefit of or be distributable to its members, trustees, officers or other private persons except that the organization shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth herein above.

b. LEGISLATIVE OR POLITICAL ACTIVITIES. No substantial part of the activities of the organization shall be the carrying on of propaganda or otherwise attempting to influence legislation by legal, governmental agencies, and the organization shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

c. OPERATION LIMITATIONS. Notwithstanding any other provisions of these articles, the organization shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from Federal Income Tax under Section 501(C) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Revenue Law) or (b) by an organization, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1954 (or other corresponding provisions of any future United States Internal Revenue Law).

d. DISSOLUTION CLAUSE. Upon the dissolution of the organization, a committee composed of voting delegates and athletics directors shall, after paying or making provisions for the payment of all of the liabilities of the organization, dispose of all the assets of the organization exclusively for the purpose of the organization in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law), as the Committee shall determine. Any of such assets not so disposed of shall be disposed of by the state court of jurisdiction in which the principal office of the organization is then located, exclusively for such purposes or to such organization or organizations as said court shall determine which are organized and operated exclusively for such purposes.

Article XII. AMENDMENT PROCEDURES

Any amendments to the Bylaws require a three-fourths vote of the members of the Conference, unless otherwise noted. All other matters related to the general business and Sport Code of the Conference and not specified elsewhere shall be decided by majority vote of those present and voting on the issue. In accordance with Robert's Rules of Order, abstentions shall not be counted as votes. *(Revised: April 2006)*

UNIVERSITY OF MARYLAND

OFFICE OF THE PRESIDENT
UNIVERSITY OF MARYLAND

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November 21, 2011

Response to the Report of the "President's Commission on Intercollegiate Athletics"

Introduction

Intercollegiate athletics is integral to the lives and education of our student-athletes. It is an integral part of the mission of the University of Maryland to support our student-athletes so that they succeed in the classroom, in their sport, and in the game of life.

Sports are also an integral part of American society. The core of a university's house is education, research, and the arts, and its front porch is intercollegiate athletics. To the tens of thousands who come cheer our Terp teams, and to the national sports media, Maryland Athletics is the public face of the institution. Successful athletic programs instill pride, loyalty, and school spirit among our students, alumni, and supporters; attract prospective students; and generate increased private support for the entire University.

The financial challenges that face the Department of Intercollegiate Athletics ("ICA") are, therefore, of concern to all constituencies of the University. Last July, I formed the President's Commission on Intercollegiate Athletics ("Commission") to review the finances and operations of ICA. This was a representative group of 17 members, co-chaired by Barry Gossett, a member of the Board of Regents of the University System of Maryland, and Linda Clement, Vice President for Student Affairs. Its charge was to make recommendations to secure greater excellence in academics and athletics and to ensure the long-term financial sustainability of ICA.

Responses to the Commission's Report

On November 14th, I made public the report of the Commission. I then invited responses to this report from:
(1) Athletic Director Kevin Anderson.
(2) The University Athletic Council ("UAC"), composed of about 27 faculty, staff, students, alumni, and administrators—chaired by Professor Nick Hadley, the Faculty Athletic Representative—who constitute the official advisory body to the President on athletic matters.
(3) The University Senate Executive Committee ("SEC"), composed of about 18 faculty, staff, and student members, chaired by Professor Eric Kasischke.

I also asked UAC and SEC to comment on the response of Director Anderson. The Commission co-chairs and Director Anderson met with UAC and SEC.

In addition, the M Club, a large group of former varsity letter-winners, submitted on its own initiative its response to the report. M Club president, Marjorie Baker, is a member of UAC.

I thank them for their responses, which helped inform my thinking. All four sets of responses are posted at www.president.umd.edu/PCIA/. I thank again the Commission for its due diligence and report.

Meetings with student-athletes and coaches

Director Anderson met with all the affected student-athletes and coaches before submitting his response.

Over the past week, I also met with all the affected teams, including about 90 student-athletes and the coaching staff. The student-athletes are some of the most impressive young people I have encountered in my career. They love their collegiate experience at the University of Maryland. They are successful students. They are generous in community service. They are proud ambassadors of the institution. The coaches are consummate professionals—talented, dedicated, and enthusiastic representatives of the University.

Our conversations on the recommendation to reduce the number of varsity teams were fraught with sadness and anguish. As the parent of a student-athlete at another school, I know that my daughter would also feel devastated if her team were to be discontinued. I appreciate the years of commitment it takes to compete at the collegiate level; the sense of identity and family that is forged with a team; the personal qualities and life skills that athletics can help develop. It is their passion, resiliency, maturity, and commitment to their University, to their teammates, and to their sport that I will always value. I am proud to serve as their President.

There was one request that many student-athletes and coaches made: that I not prolong unduly the announcement of my decision. They understood that I need to consult widely and deliberate carefully before deciding, but they also wanted as much time as possible to plan ahead.

Responses from parents, alumni, supporters, and the public

My office received e-mail petitions from more than 10,000 people to save various teams. My office also received over 500 personal e-mails in support of the teams. I read many of them. Some of the messages from parents and supporters of our student-athletes were deeply moving. My staff or I responded to each of them. I thank all those who wrote to share their support of, and commitment to, our student-athletes.

Decision on Commission's recommendation #1: Reducing the number of teams and the cost of administration

I concur with the entirety of this recommendation, including the Commission's "painful conclusion" to discontinue six athletic programs (eight teams), effective July 1, 2012: men's cross-country, indoor track, and outdoor track; men's swimming and diving; men's tennis; women's acrobatics and tumbling; women's swimming and diving; and women's water polo. All athletic scholarship commitments and affected coaches' contracts will be honored.

Two groups endorsed this recommendation, with regret: the Athletic Director and the University Athletic Council. A third group, the University Senate Executive Committee "did not reach consensus." It acknowledged that ICA must "cut expenses" and "the number of student athletes," but urged that there be "roster reductions [across teams] … rather than discontinuance of entire teams."

Director Anderson in his response noted that implementation of the Commission's recommendation of a 10% reduction in administrative costs comes on top of the nearly 20% across-the-board cuts in ICA operating expenses since FY09.

I agree with his judgment that ICA "at this point has no choice but to reduce the number of teams as well." We can no longer postpone deciding on an issue that has been raised before. Inaction could be ruinous for the future of ICA.

Director Anderson's recommendation for a "Save the Programs Campaign"

Director Anderson also recommended that supporters of any discontinued teams "be given the opportunity to raise 8 years' worth of total program costs by June 30, 2012" and, thereafter, to raise endowment funding by 2020 in order to support the program in perpetuity. He is prepared to commit two senior development officers to this cause.

I accept his recommendation. This approach has been adopted by other universities faced with painful choices in balancing their athletic budgets. The fundraising targets were set to achieve financial sustainability, not to defer the decision to discontinue programs.

If there is anything that our remarkable student-athletes have taught me over the past week, it is that there is no challenge that we cannot meet, no goal that we cannot achieve, if dedicated and passionate supporters work together for a common and urgent cause.

I am pleased to announce that the M Club immediately committed $1M to this campaign. I thank the former letter-winners for their inspiring support of our student-athletes. I have asked our Vice President for University Relations to work with ICA to find ways the University can further support this fundraising campaign.

Impact of ACC realignment

In spring 2011, Director Anderson, Faculty Athletic Representative Nick Hadley, and I actively advocated to our counterparts in the ACC to expand from 12 to 14 or 16 schools. We wanted to ensure ACC's leadership role in the on-going conference realignments that are changing the landscape of intercollegiate athletics. The eventual expansion to 14 schools also had a positive financial impact on every member school due to anticipated increases in television revenue. Our circumstances would have been far more challenging today had the ACC not expanded.

Decision on Commission recommendation #2:
Revamping fundraising

I concur that the fundraising activities of ICA and the University should be more collaborative and better coordinated in order to maximize philanthropic support. The Vice President for University Relations will work with ICA development staff to review and implement the Commission's specific recommendations. The challenges facing ICA should not be theirs alone to face. The entire University has to assist in all appropriate ways. We are one University.

Decision on Commission recommendation #3:
Reinvesting resources in remaining teams

I support the recommendation that funds recovered from budget reductions and revenue enhancements be invested in support services, such as academic advisers, athletic trainers, and sports medicine. These services will enhance the academic and athletic success of the students in the remaining teams.

The University of Maryland has one of the largest slates of varsity sports in the Atlantic Coast Conference and in the nation. As a result, given current budget realities, our teams are among the most thinly funded in the ACC on a per student-athlete basis. To continue to make deep cuts across all programs—to impose a democracy of pain—is not the path to excellence.

In the academic area, when our University faced severe budget reductions in the past, we made the hard choice to terminate academic programs, valued as they were. We did not over-extend ourselves by continuing to offer a multitude of programs to meet every demand.

So it should be in athletics. In a time of constrained resources, we have to choose: should we have fewer programs so that they can be better supported and, hence, more likely to be successful at the highest level? Or, should we keep the large number of programs that are under-supported compared to their conference peers?

The Commission's recommendation to downsize to 19 teams would place the University of Maryland just below the ACC average of 21 teams. Our investment per student-athlete would rise from near the bottom to the top half of the ACC.

The Commission's financial plan is prudent and sustainable. It does not seek to eliminate immediately the budget deficit, which was several years in the making. It stretches out the deficit reduction period to avoid causing even broader pain today.

It balances the annual operating budget by fiscal year 2015 and it balances the cumulative operating deficit by fiscal year 2019. It also starts rebuilding an ICA contingency fund for unanticipated expenses. This fund was depleted last year to cover the growing deficits of previous years.

The implementation of the Commission's recommendations will restore ICA to fiscal health and sustainability by 2019, provided that assumptions about future revenues and expenses hold true.

Decision on Commission recommendation #4:
Greater clarity in ICA financial reports

The financial statements of intercollegiate athletics everywhere are complex and detailed, with different ways of reporting multiple sources of revenues and expenses. They may seem opaque to lay readers. Different oversight agencies—the NCAA, the Board of Regents, the internal financial departments of the University—also have different accounting criteria and practices.

I endorse the recommendation to bring greater clarity and utility to the financial reports. Since April 2011, the University System of Maryland Board of Regents has been working on a new reporting format to be implemented system-wide. ICA will work with the Board of Regents on this new reporting format. I also ask ICA to develop clear benchmarks to monitor revenues and expenses periodically throughout the year.

Conclusion

The finances of Maryland Athletics in national context

The financial challenges of ICA are not unique to our institution. Over 90% of the athletic programs in NCAA Division I schools operate in the red and cannot be self-sustaining. The average NCAA Football Bowl Subdivision athletic department runs an annual deficit of about $11M, a gap that is covered by institutional support, student fees, and/or general fund dollars.

Maryland Athletics does not receive state funds, as do some other public universities. Student fees which in part support intercollegiate athletics, while substantial, are still below those of many other institutions. In these tight economic times, we must live within our means, not spend more than we can afford, and still offer a good-sized menu of non-revenue sports for a variety of student-athletes, without diverting resources from the core academic functions of the University.

The current business model of intercollegiate athletics nationwide is inequitable and unsustainable. Universities rely on the two revenue-producing sports—football and men's basketball—and the lucrative television contracts associated with these sports, in order to underwrite all the other sports for which there is a smaller cadre of passionate followers.

If we believe—as I do—that intercollegiate athletics is an integral part of the college educational experience and not only commercialized mass entertainment, then we must come together to reform this financial model. As President, I will continue to work with the ACC, the NCAA, and other national organizations to address the escalating financial "arms race" in intercollegiate athletics. We have to reset the balance between academics and big time athletics in higher education.

The Terp spirit: Turning challenge into opportunity

Here at the University of Maryland, we have one of the country's best athletic directors. Director Anderson came into difficult circumstances not of his own making. He has proven himself to be a highly-principled, energetic, and compassionate leader, who is dedicated to providing every student-athlete the opportunity to perform at the highest level in the classroom and on the field, and to become good citizens and leaders of our country.

We are also privileged to have outstanding coaches and athletics staff with the same values of professionalism, high standards of integrity, and commitment to the development of the whole student-athlete—always seeking to strive and to win, and to play by the rules. I am confident that the contributions that all of our coaches are making, and will continue to make, will ensure the success of Maryland Athletics.

Finally, to the legions of Maryland supporters, who faithfully stand by our teams and our student-athletes in up times and down because of their loyalty to the University of Maryland, I want to express to you my heartfelt appreciation.

We are one team, one Maryland. We have the vision and the resolve to turn challenge into opportunity. This is the can-do spirit that defines us as Terrapins.

Thank you for your continuing support of our student-athletes and the University of Maryland.

Sincerely,

Wallace D. Loh
President
University of Maryland

Gazette.Net
Maryland Community News

Published: Tuesday, November 27, 2012

ACC sues UM for full $50 million exit fee

by Holly Nunn Staff writer

The Atlantic Coast Conference filed a lawsuit against the University of Maryland for a $50 million exit fee that university President Wallace D. Loh said he does not expect to pay in full.

The clerk's office at Guilford County Superior Court in North Carolina confirmed that the lawsuit was filed Monday.

The lawsuit was first reported by The Chronicle, the student newspaper of Duke University.

Loh announced Nov. 19 that the university would move to the Big 10 conference in 2014, leaving the ACC and the traditions of the conference after 60 years, and setting off reactions from the university community.

In September, the ACC raised its exit fee to $50 million, a move against which Loh voted, citing "philosophical and legal reasons," he said at a news conference Nov. 19.

The motive behind the move is primarily a financial one, university officials said, making Maryland party to a chunk of revenue from the Big 10 Network. Maryland cut seven sports programs over the last year when funding for the teams was unavailable.

Last year, $248 million in Big 10 revenue was divided up among the 12 member schools.

At the Nov. 19 conference, Loh said he didn't expect the university to be paying the full $50 million exit fee and that no taxpayer money would go toward any of the fee, as the athletic department is self-sustaining.

The university would discuss the exact amount to be paid in private, he said. Loh would not say whether the university would fight the fee in court.

University of Maryland officials and ACC officials did not immediately return requests for comment.

FrederickNewsPost.com

Maryland leaves ACC for Big Ten

Suspended programs could return, university president says

Originally published November 20, 2012

By From Wire Reports

BALTIMORE -- Maryland's application for admission to the Big Ten has been approved by the conference's Council of Presidents, making the university's move from the ACC official.

With coaches and administrators lined up on a stage in the student union building, University of Maryland President Wallace Loh was joined by Big Ten commissioner Jim Delany Monday afternoon.

In his opening remarks, Loh called this a "watershed" moment, saying the board of regents voted "very strongly" to apply for membership in the Big Ten. According to Loh, the No. 1 reason for joining the Big Ten is financial.

"We will be able to guarantee the stability of the athletics department for years to come," he said.

The Big Ten Network pays a reported $25 million to each team per year; that number could rise significantly depending on how cable companies choose to carry the network in Washington and New York City. The ACC's TV deal reportedly nets each school around $18 million per year.

Loh said he and Maryland athletic director Kevin Anderson were devastated by having to cut sports, and hatched a plan so that it would "never happen again." That eventually led them to this stage. Loh says Maryland will look into reinstating some of the teams that were terminated.

Loh said that athletics also must be aligned with overall goals of the university. New resources will be earmarked to be used to support Maryland's educational mission, which includes making tuition more affordable for students.

"We are doing nothing less than developing a new paradigm for university athletics," he said. He plans to build a system where athletics supports academics, not the other way around.

Loh also said Maryland is a strong fit with the other Big Ten schools, which share research resources. He anticipated students and faculty to collaborate with peer institutions.

Many fans are "stunned," and "disappointed" by the move, Loh said. But the traditions and rivalries established in the ACC will always be a part of the Maryland culture, Loh said. His decision was made after consultation with stakeholders.

"I made the best decision I could," he said.

William E. "Brit" Kriwan, chancellor of the Maryland university system, echoed his comments from earlier Monday and said the main benefit, in his mind, is the academic cooperation between prestigious schools. No other partnership matches it, he said, except for the Ivy League.

Kirwan also said that Maryland will change the paradigm of college athletics funding, saying Loh's promise to spend money on education sends a "powerful message" about the proper role of sports to a college.

Maryland Athletic Director Kevin Anderson said the department has done "so much with so little for so long." That problem will be solved by joining the Big Ten.

"No future Maryland athletic director will ever have to look in young men and young women's eyes and say you can't compete, you can't wear the colors of the school, because we can't support you financially," he said.

Membership in the Big Ten will allow all Terps teams to compete on the highest level, according to Anderson. He's also excited that parents of all Maryland athletes will have a chance to see their kids play on the Big Ten Network.

There are multiple reports that Rutgers would follow Maryland, leaving the Big Ten with 14 members.

Delany described the Big Ten presidents as "giddy" over the chance to add Maryland and that they do not fear the turtle.

"We embrace the turtle," he joked.

Delany, too, said there is a paradigm shift in intercollegiate athletics and that it has brought about a measure of uncomfortable change. He said Maryland was targeted by the Big Ten because it was in an adjacent state and opens up new areas of the state.

"You're not just joining a Midwestern conference," he said. "We'll have East Coast offices. We're not asking you to become us."

Loh was asked how the Big Ten/Maryland marriage came about.

"It takes two people to dance," he said. But apparently the conversations only began over the last two to three weeks.

In response to a question about students who have said that the move shows a lack of loyalty and that decisions shouldn't be "just about money," Loh said it's not just about money, but about the academic partnership. But, really, it's about money.

"Somebody has to pay the bills!" he said emphatically.

Loh informed ACC Commissioner John Swofford of the decision at about noon Monday.

Asked about the possibility of paying the $50 million exit fee, Loh said the new money from the Big Ten will make it possible to handle that expense. But he does plan to try to negotiate with the ACC on how much Maryland will have to pay. As many have noted, Loh was one of two ACC presidents who originally voted against instituting the high exit fee. Loh said no tax payer dollars will be used to pay the exit fee.

Anderson said his coaches "grieved" at the thought of leaving the ACC, but eventually came to see a move to the Big Ten would be beneficial.

Delaney, asked how long Maryland has been on the Big Ten's radar, launched into a long explanation of conference expansion. The Big Ten originally did think about expanding to 16 schools when it opted only to add Nebraska, so it seems like Maryland was considered then.

Anderson admitted there will be "awkwardness" as Maryland continues to compete in the ACC until July 2014.

Patricia Florestano, the first Maryland regent to arrive at the University of Baltimore this morning, confirmed the vote to move to the Big Ten but disputed reports that it had been unanimous. She cited financial and academic considerations as reasons the decision was made.

"We've got to look to the future," she said when asked whether there had been strong sentiment against leaving the ACC.

She also said the school did not yet know how much its exit fee would end up being, or how it would be paid.

The proposal received broad support among regents, but not all favored it.

"I was against it," said former Maryland basketball star Tom McMillen, a regent and former member of Congress. "I felt there was no time for an opposing view. I felt a decision like this should have been made with more consultation and deliberation.

"The decision was all about money no matter how you sugarcoat it. I wanted to hear from athletes. I wanted to hear from the ACC."

The panel Monday was asked to essentially respond to earlier criticism from McMillen and others who said the school should have taken more time to debate the move and consult those involved.

Delaney explained that the Big Ten tried to have an open process during its past expansion rounds, and that the transparency led to rampant, damaging speculation that unnerved fans and athletes at the schools being considered.

Loh said that the compact process does not mean that there was not due diligence done. He spoke with officials at the school and in state government, donors and a "couple of students."

"Leadership, especially on controversial subjects, cannot be executed in the public limelight," he said.

Maryland hoped to avoid a disagreement over whether the regents or Kirwan had final authority to make the decision on applying to the Big Ten.

Either way, Maryland wanted -- and got -- the regents' strong endorsement on Monday.

Schools are required to give notice to the Atlantic Coast Conference by Aug. 15 and then wait about 10 months to leave. Given that and other considerations, it seems unlikely Maryland could start participating in the Big Ten until July 2014.

ACC Commissioner John Swofford said of Maryland's departure: "Our best wishes are extended to all of the people associated with the University of Maryland. Since our inception, they have been an outstanding member of our conference and we are sorry to see them exit."

There are multiple reports that Rutgers would follow Maryland, leaving the Big Ten with 14 members.

Maryland has indicated that the costs of leaving Atlantic Coast Conference-a roughly $51 million exit fee-will be outweighed by the benefits of joining the Big Ten.

Maryland has a long tradition with the ACC and is one of seven original conference members.

But Maryland -- which in recent years has favored ACC expansion -- has long hoped that the conference might improve its football profile. That, in turn, could help generate interest in Maryland's own football program, elevating recruiting and attendance. The Big Ten also has a more lucrative football television deal than the ACC -- an important fiscal consideration for Maryland.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF MARYLAND, et al.,	*	IN THE
	*	CIRCUIT COURT
Plaintiffs,	*	FOR
v.	*	PRINCE GEORGE'S COUNTY
ATLANTIC COAST CONFERENCE,	*	
Defendants.	*	Case No. CAL 13-02189

* * * * * * * * *

ORDER

Upon consideration of Defendant Atlantic Coast Conference's Motion to Dismiss or, Alternatively, to Stay Plaintiffs' Complaint, the Memorandum of Plaintiffs Board of Regents of the University System of Maryland and University of Maryland College Park in Opposition to Defendant's Motion to Dismiss or, Alternatively, to Stay Complaint, any other papers filed by the parties in connection with said Motion, the pleadings and papers filed in this action, and a hearing in open court, it is this _____ day of _____, 2013, hereby

ORDERED, that said Motion BE, and the same is, DENIED.

_____
Hon. John Paul Davey
Judge, Circuit Court for Prince George's County